railroads to pay wharfage and handling allowances to the United States, or in the alternative to establish separate wharfage and terminal charges with corresponding reductions in the line-haul rates, and (3) fix reparations for alleged unlawful charges made against the United States for past shipments.[2] The complaint did not ask for an order directing the railroads to perform the wharfage and handling services (R. 144-151).

A hearing was held at Norfolk, Virginia on July 18 and 19, 1944, before an examiner (R. 161-364). The report proposed by the examiner recommended dismissal of the complaint (R. 517-527). Exceptions were taken by the United States to the report and on April 5, 1945, the case was argued before Division 2 of the Commission (R. 527-559).

On August 3, 1945, Division 2 (with Commissioner Barnard dissenting) issued a report and order finding that the refusal of the railroads to make an allowance to the United States for wharfage and handling was an illegal and unreasonable practice and had resulted in unjust discrimination. *United States of America* v. *Aberdeen & Rockfish Railroad Company, et al.*, 263 I. C. C. 303 (R. 73-86). The defendant railroads filed a petition for reconsideration by the Commission and the effective date of the order issued by Division 2 was postponed until further order of the Commission (R. 87).

On April 3, 1946, the entire Commission heard oral argument on the case (R. 560-607) and on May 3, 1946, it issued a report and order dismissing the complaint (with Commissioners Aitchison, Splawn, Alldredge and Rogers dissenting). *United States of America* v. *Aberdeen & Rock-*

[1] An allowance is the payment of compensation to a shipper for performing a portion of the transportation obligation with respect to his own freight, in effect a refund of a part of the tariff charge.

[2] The only issue now left in the case is the issue of reparations. See pp. 11-12, *infra*.

fish Railroad Company, et al, 264 I. C. C. 483 (R. 87-101).

Thereafter, on petition of the United States, the case was reopened and reargued before the full Commission on November 6, 1946 (R. 607-648). On July 25, 1947, the Commission (with Commissioners Johnson, Rogers, Splawn, Aldredge, and Aitchison dissenting) issued a report which concluded that the complaint should be dismissed. *United States of America* v. *Aberdeen & Rockfish Railroad Company, et al*, 269 I. C. C. 141 (R. 101-114). On the same day the Commission entered an order dismissing the complaint (R. 72-73).

II. The Findings Made by the Commission.

The facts stated by the Interstate Commerce Commission in its findings may be summarized as follows:*

The railroads serving Atlantic ports do not follow the practice of assuming, in all circumstances, the obligation of unloading traffic from car to pier or from pier to car, and in no circumstances do they make an allowance to the shipper for the performance of these services. The practice of the railroads in respect to unloading depends on whether the piers are owned and operated by the railroads, by a public terminal operator, or by the owners of the freight (R. 102, 105). It is not the practice of the railroads to perform wharfage and loading services if the pier is owned and controlled by the owner of the freight, and in no event do they pay allowances in lieu of services (R. 92-94).

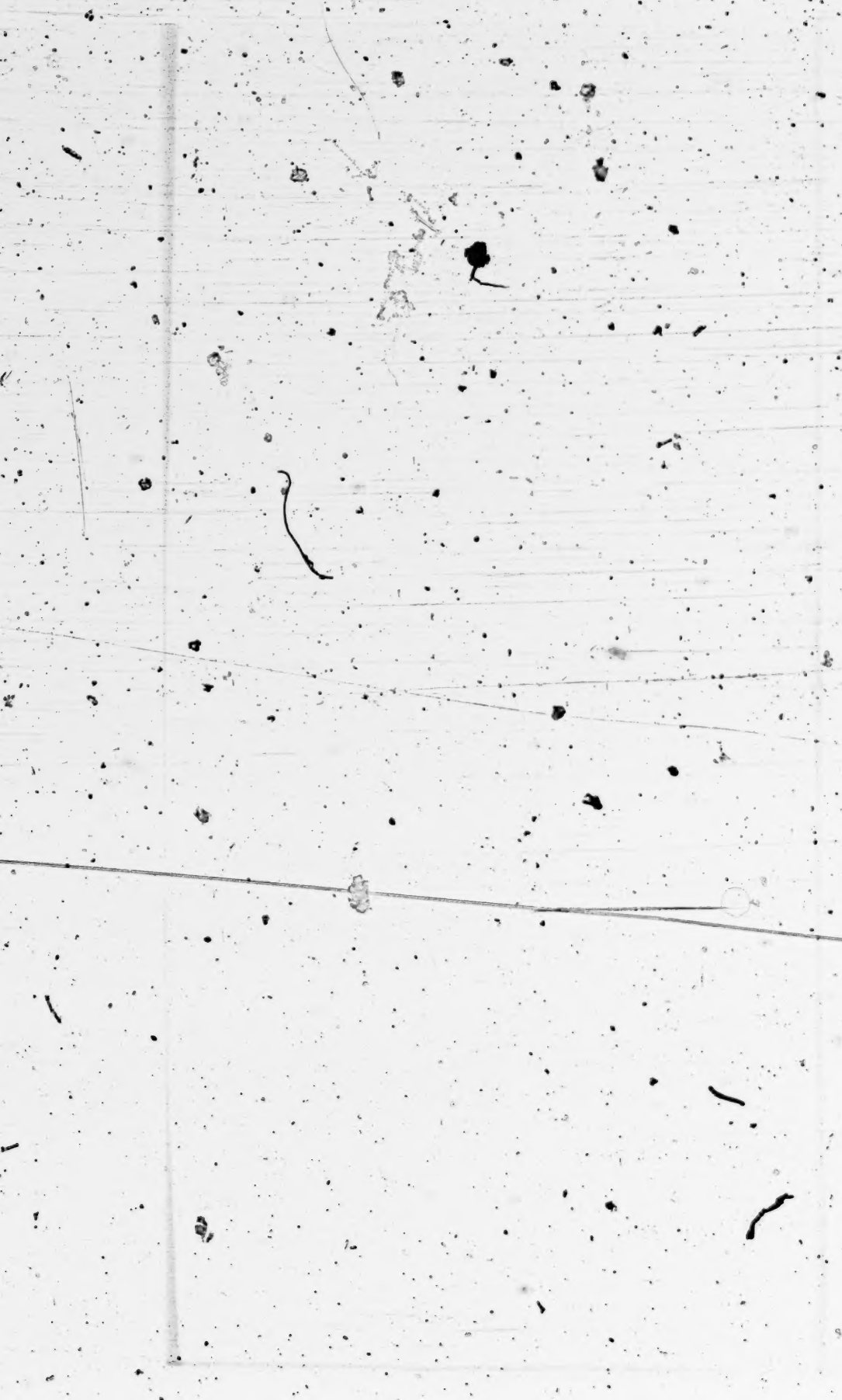
In Norfolk, Virginia, most of the railroad piers are operated by public terminal operator. Army Base piers 1 and 2 are one of the principal pier facilities in Norfolk. They were built by the United States during World War I and thereafter leased to private concerns for commercial operation as public terminal facilities (R. 88, 102).

*The evidence that supports the Commission's findings is discussed at pp. 65-95, *infra*.

Supreme Court of the United States

On Appeal From the United States District Court for the District of Columbia

BRIEF FOR THE INTERVENERS



INDEX

CITATIONS.

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 330.

UNITED STATES OF AMERICA, *Appellant*,

v.

INTERSTATE COMMERCE COMMISSION,

and

UNITED STATES OF AMERICA, *et al.*

On Appeal From the United States District Court for the District of Columbia.

BRIEF FOR THE INTERVENERS.

OPINION BELOW.

The opinion of the District Court (R. 129-134) is reported in 78 F. Supp. 580.

JURISDICTION.

The judgment of the District Court dismissing the complaint was entered on July 26, 1948 (R. 134-135). The appeal of the United States (plaintiff in the court below), was allowed on August 25, 1948 (R. 136). The jurisdiction of

this Court rests on Title 28 United States Code, Sections 1253, 2101, 2325, Act of June 25, 1948 (Public Law 773, 80th Congress). Probable jurisdiction was noted on November 8, 1948 (R. 652).

QUESTIONS PRESENTED.

1. Whether the United States is authorized to bring an action against the United States and the Interstate Commerce Commission to enjoin, annul, suspend and set aside an order of the Interstate Commerce Commission.

2. Whether an action brought by the United States against itself and the Interstate Commerce Commission to enjoin, annul, suspend and set aside an order of the Interstate Commerce Commission presents a justiciable case or controversy.

3. Whether a litigant who elects to seek reparation before the Interstate Commerce Commission is entitled to judicial review of an order of the Interstate Commerce Commission denying his prayer for reparation.

If each of these three questions is answered in the affirmative, a fourth question will arise:

4. Whether the conclusion of the Interstate Commerce Commission that the United States is not entitled to reparation by reason of the rates charged on traffic consigned to Army Base piers 1 and 2 at Norfolk, Virginia is based on adequate findings, supported by substantial evidence and otherwise lawful.

STATUTES INVOLVED.

The pertinent provisions of the Interstate Commerce Act (49 U. S. C. 1, et seq.), the Judicial Code and the Urgent Deficiencies Act of October 22, 1913 (28 U. S. C. 41(28), 43-48) are set out in the Appendix, *infra* pp. 96-106.

STATEMENT.

On November 20, 1947, the United States filed in the United States District Court for the District of Columbia a petition to enjoin, set aside and annul an order entered by the Interstate Commerce Commission on May 25, 1947 in a proceeding entitled *United States of America, Complainant v. Aberdeen & Rockfish Railroad Company, et al. Defendants*, Docket No. 29117 (R. 66-114). The petition named the United States and the Interstate Commerce Commission as defendants. The Pennsylvania Railroad Company, The Virginian Railway Company, Southern Railway Company, Atlantic Coast Line Railroad Company, Seaboard Air Line Railroad Company, and Norfolk Southern Railway Company filed a motion for leave to intervene as defendants on February 2, 1948 (R. 119-122), and this motion was granted on March 1, 1948 (R. 122).

I. The Proceedings Before the Interstate Commerce Commission.

The proceeding before the Interstate Commerce Commission was commenced on April 15, 1944 by the filing of a complaint by the United States (R. 144-151). The complaint alleged that because certain railroads (including the interveners herein) had refused to make allowances to the United States for wharfage and handling, the rates charged the United States by these railroads on traffic consigned to Army Base piers 1 and 2 at Norfolk, Virginia were unjust and unreasonable in violation of Section 1(5)(a) and Section 1(6) of the Interstate Commerce Act, unjustly discriminatory in violation of Section 2 of the Act, unduly prejudicial to military traffic and not in full compliance with Section 6(8) of the Act, and in violation of Section 15(13) of the Act. The complaint alleged that the United States had been damaged "in a sum of money not presently ascertainable" and asked, by way of relief, that the Commission (1) enjoin the alleged illegal practices; (2) require the

For a number of years prior to 1942, the piers were operated by the Transport Trading and Terminal Corporation as a public wharfinger, and as agent of the railroads. The railroads compensated the terminal operator (their agent) for its services of unloading freight from car to pier, whenever the railroads undertook by tariff to perform that service, and for providing the pier; these payments are sometimes referred to as handling and wharfage charges. This arrangement imposed on the Transport Trading and Terminal Corporation other duties of a railroad agency such as collection of freight charges, protection against loss and damage claims, etc. (R. 88, 102).

The railroads' tariffs did not name Army Base piers 1 and 2, but referred to the tariff filed by the Norfolk and Portsmouth Belt Line R. R. Co. (referred to hereafter as the "Belt Line"), a terminal carrier which is owned by the line-haul carriers serving Norfolk and which performs terminal services for those carriers at Norfolk. The tariff filed by the Belt Line provided for absorption of the wharfage and handling charges on traffic destined for the facilities operated by the Transport Trading and Terminal Corporation. The Belt Line tariffs did not refer to Army Base piers 1 and 2 as such, but merely described the piers as facilities of the Transport Trading and Terminal Corporation (R. 88, 103-104).

Because of war conditions the United States, on June 15, 1942, terminated the lease under which the piers had previously been operated, and the War Department took over and operated the piers for the movement of military traffic. After that date, the Transport Trading and Terminal Corporation no longer had possession of the two piers and could not continue to perform the services that it had performed theretofore. Although after June 15, 1942 Transport Trading and Terminal Corporation no longer had any facilities at Norfolk, through oversight the interveners' tariffs were not changed immediately, but for

a period of time continued to refer to Transport Trading and Terminal Corporation (R. 88-89, 102, 103).

When the Army began operation of the piers, it supervised all activities on the piers and took possession and control of the piers and of the freight passing over the piers (R. 88-90; 92-93, 96, 104).

Soon after the Army took over the piers, the War Department made written request of the railroads to pay an allowance for wharfage and handling. The interveners declined these requests. On May 1, 1943, nearly a year after the Army had taken over the piers, the War Department requested that the intervener, The Pennsylvania Railroad Company, perform the services at the piers.[4] (R. 80). A similar request was made on May 22, 1943 on all Norfolk lines. The interveners refused to make allowances or to perform the services on the ground that the piers were being operated by the owner of the freight (R. 80, 90, 92).

Although the interveners declined to make an allowance for wharfage and handling or to perform the services on the piers, they made special arrangements so that as to traffic moving over Army Base piers 1 and 2 the United States would receive the benefit of export rates, which were lower than the domestic rates. The tariffs filed by the interveners prior to the war provided that export rates should apply only to traffic "which does not leave the possession of the inland carrier until delivered to the ocean carrier or its agent * * *." (R. 103). This provision would have prevented the application of the export rates on freight handled through Army Base piers 1 and 2 at Norfolk because that traffic left the possession of the inland carriers when delivered to the United States, the owner of the traffic. The interveners included a provision in the tariffs that the export rates should apply

[4] The letter of the War Department stated that the request was made as "a prerequisite" to the filing of a complaint before the Interstate Commerce Commission (R. 375).

also on shipments consigned to the United States Government and handled through Navy bases, Navy yards or Army bases for export to foreign countries. By reason of this provision the United States received the benefit of the lower export rates on traffic moving over the Army Base piers 1 and 2 at Norfolk (R. 91, 92, 93, 103, 106).

III. Conclusions Adopted by the Commission.

In its reports the Commission reviewed the relevant facts and discussed the principles of law that it believed were applicable. The Commission found that the railroads at Norfolk were under no obligation to provide pier facilities but that in any case they had not failed to provide reasonable facilities at Norfolk (R. 93, 94, 102, 105). In discussing the duty of the railroads to provide piers or pier services, the Commission said, in its last report (R. 102):

> "It is neither the legal duty of the railroads to provide piers, which are essentially steamship facilities, nor to load or unload carload freight except in unusual circumstances, such as livestock, or freight that is to be transhipped by the railroads or their agents. When they obligate themselves to load or unload carload freight, the duty is established by tariff undertaking. In assuming that obligation with respect to export and import traffic, the carriers have restricted the practice to so-called public piers, that is, piers operated by railroads, steamship companies, or public wharfingers, and have excluded the so-called private piers, that is, piers operated by the owners of the freight. See *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.*, 229 I. C. C. 463."

The Commission concluded that the refusal of the railroads at Norfolk to make an allowance to the United States for unloading and wharfage had not resulted in the imposition of rates that were unreasonable or unjust. The Commission rejected the contention that under the tariffs the

railroads were bound to make these allowances (R. 92, 97, 103, 106-108). The Commission held that after June 15, 1942, the references in the tariffs to the Transport Trading and Terminal Corporation "were meaningless because the Transport Trading and Terminal Corporation no longer had any facilities at Norfolk" (R. 89). The Commission also held that to sustain the contention of the petitioner with respect to the meaning of the tariffs "it would be necessary to read into the tariffs words which were not there" (R. 103).

> "There is nothing in the tariffs, however, that requires the defendants to pay the complainant an allowance for wharfage and handling traffic through the Army Base at Norfolk." (R. 103).

The Commission also concluded that the refusal of the railroads to make the allowances sought by the United States did not result in unjust discrimination because the railroads did not make allowances or perform wharfage or unloading services for a private shipper on its own piers and that the United States was, therefore, being treated in exactly the same manner as other shippers who owned piers (R. 92-94, 105). In dealing with this point the Commission said (R. 105):

> "With respect to the allegation of unjust discrimination, the complainant asks to be treated the same as commercial or private interests. The defendants argue that when these two piers were taken over by the complainant on June 15, 1942, they became private piers to all intent and purpose. The defendants do not pay allowances to private shippers for wharfage or for handling export freight, and they do not perform that service on private piers. * * * The freight of other shippers at Norfolk which receives unloading service is not the like kind of traffic contemplated by section 2 of the act dealing with unjust discrimination, and if handled in the same manner as the complainant's freight the export rates would not apply, much less the

> accessorial service demanded by the complainant or an allowance therefor."

The Commission also rejected the Government's charges of unlawful discrimination against military traffic in violation of Section 6(8) of the Interstate Commerce Act. After pointing out that the Government received the benefit of the export rate by special tariffs, a rate to which the traffic would not be entitled but for the special tariff since the traffic passed into the custody of the owner at Norfolk, the Commission held that "if anything, the complainant is being favored" (R. 93) and added that "the granting of one concession does not necessarily require another to the same party. The allegation of a section 6 violation is not sustained." (R. 103).

The Commission rejected the argument that the railroads would be unjustly enriched if the wharfage and handling allowance were not paid to the United States for its traffic moving over the Army Base piers. The Commission concluded that nothing had been added to the line-haul export rates to cover the cost of wharfage and handling, and that the rates involved were below the reasonable maximum level (R. 92, 105-107). It pointed out that the record showed that the existence or non-existence of the port service does not affect the rate level (R. 92, 107). The Commission held, therefore, that the refusal to pay the allowances did not constitute unjust enrichment (R. 105-107).

The ultimate conclusion reached by the Commission in its Report on Reconsideration was stated in these words (R. 98):

> "On reconsideration, we reverse the prior findings and now find that the defendants' refusal to make the complainant an allowance or to perform the services afore-mentioned or to state in their tariffs the wharfage and handling charges at Norfolk separately from their rates is not shown to have been or to be an unjust or unreasonable practice, or to have resulted or

to result in unreasonable or inapplicable rates, or to have been or to be unjustly discriminatory to the complainant. The prior order entered in this proceeding will be vacated, and the complaint will be dismissed."

In the Report on Reargument, the Commission, in reaffirming the conclusions of its prior report, dealt specifically with the contention made by the United States that by reason of the refusal of the railroads to grant the allowances sought, the rates charged the United States had been unreasonable (R. 108):

> "No evidence was adduced by the complainant to show that the export rates to Norfolk, in and of themselves, were and are unreasonably high. The complainant's contention is that these rates are shipside rates and they are unreasonable because no allowance has been made to it for the wharfage and handling. It is well settled that there is nothing inherent in export traffic which entitles it to rates lower than those applied to domestic traffic, and as nothing has been added to the export rates here in issue to cover the wharfage and handling they are not above a reasonable maximum level when a reasonable charge for wharfage and handling is added. This being true, an order directing the defendants to pay the complainant reparation in the amount of the aforementioned wharfage and handling charge would make the export rates just that much below the upper limit of reasonableness. * * *
>
> "On reargument, we affirm our findings in the prior report on reconsideration. The complaint will be dismissed."

Prior to the date on which the Interstate Commerce Commission entered the order that the United States now attacks, (July 25, 1947) the Norfolk Army Base Terminal had been returned to the jurisdiction of the United States Maritime Commission, and the Maritime Commission had leased the property to public terminal operators.[5] In its

[5] See the *Annual Report to Congress by the United States Maritime Commission* for the period ending June 30, 1947, page 8.

Report on Reargument, the Commission referred to the fact that the piers were again to be operated by private interests and made the following statement (R. 108):

> "During the argument we were advised by counsel for the complainant that efforts are being made to have these two piers operated in a manner similar to that in effect prior to June 15, 1942. So that the purpose of this proceeding now is for reparation only."

IV. Proceedings in the Court Below.

In its petition filed in the court below, the United States alleged that the order of the Commission dismissing the prayer of the United States for reparation was not supported by proper findings, that the findings made by the Commission were not supported by substantial evidence and that its order was arbitrary and contrary to law (R. 71).

The United States as defendant in the action filed an answer alleging that the action was instituted at the request of the War Department, that the United States "as provided by law" was a defendant in the proceeding, that the Interstate Commerce Commission was authorized by law to appear and to defend its order without regard to the position which the United States might take in the action, and that in these circumstances the United States neither admitted nor denied any of the allegations of the petition. The answer for the United States as defendant was signed by the same Assistant Attorney General who signed the petition filed by the United States as plaintiff. (R. 118-119).

The Interstate Commerce Commission appeared and filed an answer raising two defenses: (1) That the court is without jurisdiction, under the Urgent Deficiencies Act, to entertain an action to review an order of the Commission denying reparation for past alleged violations of the Interstate Commerce Act; and (2) That the order of the Commission is lawful and is supported by the evidence (R. 115-117).

The answer filed by the interveners raised four defenses: (1) That the district court was without jurisdiction because there is no case or controversy in view of the fact that the United States is both plaintiff and indispensable party defendant, and that relief could be granted in this action only against the United States or its instrumentality, the Interstate Commerce Commission; (2) that the court had no jurisdiction because the United States had no statutory standing to institute the action; (3) that the court had no jurisdiction, under the Urgent Deficiencies Act, to review an order of the Interstate Commerce Commission denying reparation for alleged past violations of the Interstate Commerce Act; and (4) that the order of the Commission was lawful and supported by the evidence (R. 123-127).

A three-judge court, convened under the provisions of the Urgent Deficiencies Act (R. 128), heard the case on May 5, 1948 (R. 1-66). On June 28, 1948 the district court handed down its opinion holding that the United States was not authorized to bring a suit against itself and the Interstate Commerce Commission to enjoin, suspend, annul or set aside an order made by the Commission and dismissed the complaint. (R. 129-134). The order dismissing the complaint was filed on July 26, 1948 (R. 134-135).

SUMMARY OF ARGUMENT.

I.

The United States is not authorized to institute a suit to enjoin or set aside an order of the Interstate Commerce Commission. Under the Urgent Deficiencies Act, a suit to review an order of the Interstate Commerce Commission must be brought against the United States. No authority can be found in that statute for a suit by the United States attacking an order of the Interstate Commerce Commission, and this is the first time any such suit has been instituted. The fact that the statute requires

that the suit be brought against the United States and places on the Attorney General, acting on behalf of the United States, the responsibility for the defense of such a suit demonstrates that Congress did not intend to authorize a suit by the United States, as plaintiff, against itself.

The United States is the only indispensable defendant in a suit to enjoin or set aside an order of the Commission and is the only party that can be sued under the Urgent Deficiencies Act. The Interstate Commerce Commission has a discretionary right under the statute to intervene, but the Commission is not a necessary party and cannot be named as a defendant without its consent. *Illinois Central R. R. Co.* v. *Public Utilities Commission*, 245 U. S. 493; *United States* v. *Idaho*, 298 U. S. 105; *United States* v. *Griffin*, 303 U. S. 226. The appellant is urging a construction of the statute that would permit the United States to be both plaintiff and the only defendant and in which the Attorney General would represent both sides of the controversy.

This Court has held that the statutory requirement that the suit be brought against the United States is a matter of substance and not a mere matter of form as the appellant contends. Moreover, the appellant's position is inconsistent with the provisions of the statute placing the Attorney General in control of the interests of the Government in a suit to annul, suspend, or set aside an order of the Interstate Commerce Commission.

The legislative history of the statute shows that the Congress did not intend to authorize the United States to bring suits attacking the orders of the Interstate Commerce Commission. This conclusion is supported by the fact that where Congress has intended to authorize an agency of the Government to attack an order of the Commission, that authority has been explicitly conferred. The fact that the Attorney General has not chosen to defend the Commission's orders in some cases brought by private persons to review an order of the Commission has no relevancy to the

question whether the United States may institute a suit against itself to set aside an order of the Commission.

It would be contrary to the statutory plan of review of the Commission's orders to permit the United States to institute a suit attacking an order of the Commission. There is no merit in the argument that the statute should be construed as giving the United States the right to attack the Commission's orders in the courts because all private shippers have that right. This is the same kind of argument that was rejected by this Court in *United States* v. *Cooper Corp.*, 312 U. S. 600.

II.

The attempt by the United States to sue the United States and the Interstate Commerce Commission does not present a justiciable case or controversy. Since a suit attacking an order of the Commission must be brought against the United States, the same person, the United States, is both plaintiff and the indispensable defendant. A justiciable controversy is not created because the United States named the Interstate Commerce Commission as a defendant. The statute does not authorize suit against the Commission. In any event, there can be no diversity of legal interest between the United States as plaintiff and the Interstate Commerce Commission as defendant since the Commission is an instrumentality of the United States. Intervention by the railroads does not create a justiciable controversy since intervention presupposes a suit duly brought. The fact that the Attorney General has declined to defend the Commission's orders in certain cases is irrelevant since a justiciable case or controversy existed in those cases between the persons who instituted the suit and the United States.

III.

Under Section 9 of the Interstate Commerce Act a person must elect whether to seek reparation before the Inter-

state Commerce Commission or by a suit in a United States district court; the statute expressly provides that the litigant does not have a right to pursue both remedies. The appellant elected to institute an action before the Interstate Commerce Commission which denied its prayer for reparation; it follows that the order of the Commission is not reviewable. *Standard Oil Co.* v. *United States*, 283 U. S. 235; *Ashland Coal & Ice Co.* v. *United States*, 61 F. Supp. 708, (E. D. Va. 1945) aff. *per curiam*, 325 U. S. 840. The decisions of this Court that bar review of an order of the Commission denying reparation do not rest on the so-called "negative order" doctrine but on the statutory scheme enacted by the Congress for dealing with reparation. See *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 140, footnote 23.

This interpretation of the election of remedies provision of Section 9 is not inconsistent with the primary jurisdiction rule. That rule requires only that there be preliminary resort to the Commission for decision of questions committed by the Congress to the administrative judgment of the Commission. The primary jurisdiction rule does not require that a claim for damages be submitted in the first instance to the Commission but only that a determination by the Commission on administrative questions be secured before a suit is instituted in the district court or while such a suit is pending. *Tank Car Corp.* v. *Terminal Co.*; 308 U. S. 422; *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. In this case appellant could have submitted the administrative questions to the Commission for decision, and then, if the Commission's decision were favorable, brought an action in a United States district court for reparation.

The decision of this Court in *El Dorado Oil Works* v. *United States*, 328 U. S. 12, does not support appellant's position. No issue arose in that case as to the right of the United States to sue itself or as to the meaning of the election of remedies provision of Section 9. The decision in

that case relates only to the right of review in the event the litigant does not seek damages before the Interstate Commerce Commission, but submits only an administrative question with a view to obtaining a determination that can be used in litigation in a district court.

IV.

The order of the Commission is supported by substantial evidence and is otherwise lawful.

Before the Interstate Commerce Commission, appellant argued (1) that when the Army took over Base piers 1 and 2 for its own purposes it was thereafter entitled to be paid the same wharfage or rental costs (one cent per hundred pounds of freight) that were incurred by the railroads when the facility was used by the railroads as a railroad terminal and (2) that the railroads were required to appoint the Army their agent and to pay to the Army the same unloading costs (three cents per hundred pounds of freight) previously incurred by the railroads when the agent of their own selection unloaded freight in railroad custody. In short, the appellant contended that the railroads had an absolute legal duty to provide the Army with piers for its exclusive use and to employ the Army to unload traffic which belonged to the United States and was in the possession of the Army (although the railroads owe these alleged obligations to no other shipper).

Appellant also argued that the railroads were bound to pay four cents per hundred pounds to the Army, notwithstanding the fact that the line-haul rates to Norfolk were fixed without including or specifically taking into account the cost of wharfage and handling; notwithstanding the fact that there was no evidence whatsoever before the Commission to support appellant's assertion that the line-haul rates to Norfolk paid by the Army were unreasonable; and notwithstanding the fact that the rates charged the Army were not higher but were less than the rates charged other shippers similarly situated.

The Commission properly rejected these arguments.

The Interstate Commerce Commission correctly held that it was not the legal duty of the railroads to provide piers, which are essentially steamship facilities, or to unload carload export freight, unless the railroads assume these obligations by their tariffs. *Barringer & Co.* v. *United States*, 319 U. S. 1, 3; *Penna. R. R. Co.* v. *Kittanning Co.*, 253 U. S. 319, 323; *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.*, 229 I. C. C. 463 (1938); *Wharfage Charges at Atlantic and Gulf Ports*, 157 I. C. C. 663 (1929); 174 I. C. C. 263 (1931). The question whether piers and unloading are "transportation" facilities and service is not determinative. This Court has recognized that a "transportation service" may be a service that a railroad is not obligated to perform. See *Railroad Board* v. *Duquesne Co.*, 326 U. S. 446, 453. The decisions in *Myrick* v. *Michigan Central R. R. Co.*, 107 U. S. 102, and *N. Y. Central R. Co.* v. *The Talisman*, 288 U. S. 239, do not establish that the railroads were under a legal duty to provide piers or to load or unload carload export freight.

The Commission's conclusion that after the Army seized the piers the tariffs of the railroads imposed no obligation upon the railroads to make payments to the Army for wharfage or unloading is correct as a matter of law, and is supported by substantial evidence. The applicable tariff referred to the agency relationship existing between the railroads and the Transport Trading and Terminal Corporation—a relationship that was terminated when the Army seized the piers. The tariffs did not obligate the railroads to pay the Army a charge for wharves that the Army had seized nor did they obligate the carriers to appoint the Army their agent for the purpose of unloading freight in the custody of the Army. That the tariffs did not obligate the railroads to make payments to the Army for wharfage and unloading was admitted by the Army itself, which in the opening stages of the controversy asked the carriers to change the tariffs so as to provide for these payments to the Army.

The Commission correctly concluded that it was not the practice of the railroads in dealing with export traffic to obligate themselves to load or unload carload freight except at public piers, and that the railroads under no circumstances assumed that obligation at piers controlled by a shipper. Cf. *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.*, 229 I. C. C. 463 (1938); *City of Newark* v. *Pennsylvania R. Co.*, 182 I. C. C. 51 (1932); *Newark, N. J. Chamber of Com.* v. *Pennsylvania R. Co.*, 206 I. C. C. 555 (1935).

There was substantial evidence in the record before the Commission to support its conclusion that when the Army seized the piers and took over their operation, the piers ceased to be public piers and became private piers. The evidence showed that after the seizure the Army changed the method of operation of the piers, took custody of the freight passing over the piers and otherwise acted in all respects as the owner of a private pier would act.

The Commission correctly concluded, both on the facts and the law, that the railroads did not discriminate against the Army in violation of Section 2 of the Interstate Commerce Act by refusing to pay four cents per hundred pounds for wharfage and unloading; in this respect, the Army was treated exactly in the same way as all other owners of private piers. The only respect in which the Army was treated differently from the owners of private piers was that the Army was given an advantage over those owners by being accorded the benefit of the lower export rates which would not have applied in the case of any other owner of a pier who took possession of his own freight as the Army did.

The Commission correctly held that even if the railroads had a legal obligation either to provide piers or to unload export carload freight, the obligation was to provide facilities and service and not to pay allowances. *Atchison Railway Co.* v. *United States*, 232 U. S. 199. The facts before the Commission support its conclusion that the Army did not desire the railroads to furnish piers or to

perform the unloading service; indeed, the proof showed that performance by the railroads of the unloading service would have been impracticable and would not have been permitted by the Army on any terms that would have been feasible. Thus, even if it is assumed (contrary to the well established rule) that the railroads were under an obligation to provide piers and unloading service, they were relieved of that obligation by reason of the fact that the Army chose to provide the facilities and to perform the service itself, and, in effect, prevented the railroads from discharging their asserted legal obligation. *United States* v. *Am. Tin Plate Co.*, 301 U. S. 402; *United States* v. *Pan American Corp.*, 304 U. S. 156; *United States* v. *Wabash R. Co.*, 321 U. S. 403.

There was no evidence before the Commission to support appellant's contention that the line-haul export rates charged the Army were unreasonable. The line-haul export rates were not made in contemplation of the payment of four cents per hundred pounds of freight or of any other amount for wharfage or unloading service; were not made in contemplation of the furnishing of such facilities or services; and contained no factor or increment to cover the cost of these facilities and services. The evidence before the Commission showed that the export rates to Norfolk are lower than maximum reasonable rates because they are depressed to the basis of the Baltimore export rates for competitive reasons.

The fact that the Army was charged no more than other shippers in the same situation, but, on the contrary, was charged less because of the special concession that permitted application of the export rate, is a complete answer to appellant's charge that the railroads have been unjustly enriched.

ARGUMENT.

I. The United States is Not Authorized to Institute an Action to Enjoin and Set Aside an Order of the Interstate Commerce Commission.

No suit can be brought to enjoin and set aside an order of the Interstate Commerce Commission except in compliance with the provisions of the Interstate Commerce Act and the Urgent Deficiencies Act, Act of October 22, 1913 (Ch. 32, 38 Stat. 208, 28 U. S. C. 41, 43-48).[6] *North Dakota* v. *Chicago & N. W. Ry. Co.*, 257 U. S. 485; *Lambert Co. v. Balt. & Ohio R. R. Co.*, 258 U. S. 377; *Venner* v. *Mich. Central R. R. Co.*, 271 U. S. 127; *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 523. The United States recognizes this principle and asserts that the right to maintain this action is conferred by the Urgent Deficiencies Act. (Appellant's Brief, pp. 14, *et seq.*)

This attempt of the United States to attack in the courts an order made by the Interstate Commerce Commission is unprecedented. So far as the reports disclose, this is the first time that the United States as plaintiff, has instituted an action *eo nomine* to enjoin and set aside an order of the Interstate Commerce Commission.[7] If Congress had

[6] The discussion in this brief, as in Appellant's Brief, is directed to the provisions of the Urgent Deficiencies Act as they existed at the time this suit was brought. The pertinent provisions of the Urgent Deficiencies Act, with certain changes in form, were incorporated into Title 28, United States Code by Public Law 773, 80th Congress, approved June 25, 1948, effective September 1, 1948.

[7] Appellant cites a number of cases as precedents for this action but in none of those cases did the United States bring an action *eo nomine* to enjoin and set aside an order of the Interstate Commerce Commission. For a discussion of the cases cited by appellant in this connection see pp. 40-42, 52-53, *infra*.

intended to authorize litigation of so novel and anomalous a character it may be assumed that Congress would have stated its intention in language so explicit as not to permit of misunderstanding or debate. Appellant is not able to point to any such explicit statement of Congressional intent. On the contrary, the language of the Interstate Commerce Act and the Urgent Deficiencies Act shows affirmatively that Congress did not intend to authorize the United States to enjoin, annul, suspend and set aside an order of the Interstate Commerce Commission.[8]

Section 17(9) of the Interstate Commerce Act provides that a suit to enjoin, suspend and set aside an order of the Interstate Commerce Commission may be brought "in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend or set aside orders of the Commission, but not otherwise." The provisions of law referred to in Section 17(9) as being "applicable in the case of suits to * * * enjoin, suspend or set aside orders of the Commission" are the provisions of the Judicial Code as it was amended and supplemented by the Urgent Deficiencies Act.

Section 207 of the Judicial Code as amended by the Urgent Deficiencies Act (28 U. S. C. 41(28)) provides that

[8] Appellant contends that there is no express limitation in the statute of the right of the United States to bring an action to set aside an order of the Interstate Commerce Commission and that the statute should not be interpreted in derogation of the rights of the United States unless those rights are "clearly and affirmatively" limited. (Appellant's Brief, p. 15) The fact that the statute requires that the suit be brought against the United States as the indispensable defendant is in itself a clear and affirmative limitation of the right of the United States to institute such an action. In any event the general canon of construction cited by appellant should be read in the light of the declaration of this Court in *United States v. Rice*, 327 U. S. 742, 749, "* * * it is clear that the United States cannot assert, by virtue of its sovereignty, a right of appeal which no statute has conferred, or which, if conferred, has been abolished."

the district courts of the United States shall have original jurisdiction of cases brought to enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission. The Urgent Deficiencies Act (28 U. S. C. 44) provides that in respect to cases brought to enjoin, set aside, annul or suspend an order of the Interstate Commerce Commission, the procedure in the district courts shall be as provided in Sections 45, 45a, 46, 47, 47a and 48 of Title 28 U. S. C. Of the sections so enumerated, Section 46 of Title 28 (Section 208 of the Judicial Code as amended) is the most important for present purposes.[9] That section provides:

> "Suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission shall be brought in the district court *against the United States*." (Italics supplied)

The effect of Section 46 is to make the United States an indispensable party to any suit to enjoin or set aside an order of the Interstate Commerce Commission. *North Dakota* v. *Chicago & N. W. Ry. Co.*, 257 U. S. 485, 490; *Lambert Co.* v. *Balt. & Ohio R. R. Co.*, 258 U. S. 377, 382; *Illinois Central R. R. Co.* v. *Public Utilities Commission*, 245 U. S. 493; *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, 164.

The United States is not only an indispensable party defendant in a suit brought to enjoin or set aside an order of the Commission; it is the *only* party that can be sued for this purpose. Under the provisions of Sections 212 and 213 of the Judicial Code, as amended by the Urgent Deficiencies Act (28 U. S. C. 45a) the Interstate

[9] The provision is now embodied in 28 U. S. C. 2322. In reenacting Section 46 of 28 U. S. C., the Act of June 25, 1948 omitted the provision that actions to enjoin an order of the Commission should be brought against the United States. The Revisor's Notes stated that the provision was omitted because it is now covered by Section 2322 of Title 28.

Commerce Commission may, if it chooses to do so, appear as a party to the action on its own motion and as of right. But whether the Commission is to appear and participate in the suit is a matter left wholly to the discretion and volition of the Commission; one who wishes to attack an order of the Interstate Commerce Commission has no right to name the Interstate Commerce Commission as a defendant in a suit brought for that purpose. The Commission cannot be compelled to appear in the litigation to defend its order, and it is always open to the Commission to abstain from the litigation and to leave the defense of its order to the Attorney General. Indeed, the statute places on the Attorney General, acting on behalf of the United States, the primary responsibility for the defense of the suit. See pp. 32-33, *infra*. If the Interstate Commerce Commission should be named as a party defendant and if the Commission should choose to make a motion to dismiss as against it, the motion should be granted. See *Illinois Central R. R. Co.* v. *Public Utilities Commission*, 245 U. S. 493; *Isbrandtsen-Moller Co.* v. *United States*, 14 F. Supp. 407, 411 (S. D. N. Y. 1936) aff. on other grounds 300 U. S. 139, 140.[10]

[10] In *Isbrandtsen-Moller Co.* v. *United States*, 14 F. Supp. 407 (S. D. N. Y. 1936) aff. 300 U. S. 139, 140, the plaintiff brought a suit in equity to enjoin an order made by the Secretary of Commerce in the exercise of functions formerly exercised by the United States Shipping Board Bureau, the functions having been transferred to the Department of Commerce by Executive Order. The applicable statutory provisions (46 U. S. C. A. 830) required that the suit to enjoin the Secretary's order be brought under the same provisions of the Urgent Deficiencies Act that apply to a suit to enjoin or set aside an order of the Interstate Commerce Commission. The plaintiff named as defendants not only the United States but also the Secretary of Commerce, the Department of Commerce, the Shipping Board Bureau of the Department of Commerce, the Director of the Shipping Board Bureau and the District Attorney. A motion was made to dismiss the suit as against the Department of Commerce and the Shipping Board Bureau and the Director of the Shipping

See also *United States v. Idaho*, 298 U. S. 105 and *United States v. Griffin*, 303 U. S. 226, 238-239.

In *Illinois Central R. R. Co. v. Public Utilities Commission*, 245 U. S. 493, certain carriers brought a suit to restrain State officials from interfering with the establishment and maintenance of intrastate rates which the carriers had adopted pursuant to an order of the Interstate Commerce Commission. The State officials filed a cross bill seeking to have the order of the Interstate Commerce Commission declared void and to enjoin the United States and the Commission from enforcing the order and the carriers from complying with it. The United States objected to the jurisdiction on the ground that the case was not brought in the district court where the petitioner resided in accordance with the venue provisions of the Urgent Deficiencies Act (28 U. S. C. 43). The court held that the United States had consented to be sued only in the district of the petitioner's residence and could not be sued elsewhere and that accordingly the cross bill could not be maintained against the United States. The State officials argued that even if the cross bill could not be maintained against the United States, it could be maintained against the carriers and the

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Board Bureau and the motion was granted. The district court said (14 F. Supp. 401, 411):

> "Thus the Department of Commerce was made to take over the functions of the Shipping Board. But it is a part of the executive establishment of the United States and a suit against it is in reality a suit against the United States. The United States was made a party to this suit and is a necessary party. 28 U. S. C. A. § 46; *Illinois Central Railroad Co. v. Public Utilities Commission*, 245 U. S. 493, 38 S. Ct. 170, 62 L. Ed. 425. As the United States has consented to be sued and is a party and neither one of its departments nor any subdivision of such department can have any interest in the action different from that of the United States itself, they appear to have no interest which will support the contention that they are proper parties, and the motion to dismiss as to them is granted."

Interstate Commerce Commission. This Court rejected that contention. The Court, referring to suits to set aside orders of the Interstate Commerce Commission, said (245 U. S. at p. 504):

> "By statute such suits are required to be brought against the United States * * *"

and held that because the suit could not be maintained against the United States it could not be maintained against either the carriers *or the Interstate Commerce Commission.* In dealing with this latter point, the Court said (245 U. S. at p. 505):

> "The claim is made that in any event the cross bills should have been retained as to the defendants therein other than the United States. But this is not an admissible view. As before indicated, the United States is made by statute a necessary party to a suit to set aside an order of the Commission, and this means that it is to stand in judgment as representing the public."

In *United States* v. *Idaho*, 298 U. S. 105, 109, this Court said:

> "This suit is not one brought to set aside for error or irregularity an order of the Commission on a matter within its jurisdiction. *In such a proceeding the United States is the only party named as defendant;* others interested become parties by intervention. See Commerce Court Act, June 18, 1910, c. 309, § 3, 36 Stat. 539, 542, Urgent Deficiencies Act, Oct. 22, 1913, c. 32, 38 Stat. 208, 219." (Italics supplied)

The United States argues that the statute gives the United States the right to name the Interstate Commerce Commission as a defendant. (Appellant's Brief, pp. 26-27). The decisions cited by the United States do not support this contention. On the contrary, in *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, one of the cases cited by the appellant, the opinion of this Court emphasized that in a suit under the Urgent Deficiencies Act to enjoin

or set aside an order of the Interstate Commerce Commission the United States should be named as the defendant.[11]

The argument that the United States has a right to name the Interstate Commerce Commission as a defendant is contradicted by the legislative history of the statute. The requirement that a suit to enjoin or set aside an order of the Commission be brought against the United States was first inserted in the statute by the Mann-Elkins Act of June 18, 1910, c. 309, 36 Stat. 542. The history of that statute shows that the requirement that the suit be brought against the United States was intended to prevent suits from being brought against the Interstate Commerce Commission as had been the practice prior to the enactment of the statute.[12]

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[11] Appellant also cites *Cargill, Inc.* v. *United States*, 44 F. Supp. 368 (N. D. Ill. 1942). Giving that decision full weight, it indicates nothing more than that in appropriate cases a plaintiff who is seeking to enjoin an order of the Interstate Commerce Commission may join as defendants carriers who are seeking to take affirmative action in reliance on the order. The decision has no bearing on the question of the right of a plaintiff to join the Interstate Commerce Commission as a defendant. It should be noted that the decision does not support the conclusion that in the case at bar the United States could have named the interveners as defendants. In this case the district court could not have ordered the interveners to make reparation to the plaintiff or given it any other relief as against them.

[12] See House Report 923, 61st Congress, 2nd Session, pages 3, 7, 159 and Senate Report 355, 61st Congress, 2nd Session, page 6. The House Report sets forth in full the message of President Taft recommending the passage of the Mann-Elkins Act; that message urged that all proceedings affecting orders and decisions of the Interstate Commerce Commission should be brought by or against the United States.

The statements in the Senate Report are particularly significant on this point. That report, after referring to the fact that in *Texas and Pac. Railway* v. *Interstate Commerce Commission*,

The appellant does not expressly argue that the United States has a right to bring a suit against the intervening railroads to annul the Commission's order, presumably because appellant recognizes that the argument could not be reconciled with the language of the statute. But appellant does appear to suggest at one point in its argument that the fact that the railroads have intervened in this case supplies a basis for holding that the United States has a standing to maintain this litigation. (Appellant's Brief, p. 28). The logical infirmity of this argument is obvious. Either the United States had the authority to institute this suit at the moment the petition was filed or it did not. If at that point of time the United States had no standing to file the petition, the subsequent appearance of the Interstate Commerce Commission and the subsequent intervention of the railroads are both immaterial.[12] The Urgent Deficiencies Act cannot be given one meaning in a case in which the Interstate Commerce Commission chooses to ap-

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162 U. S. 197 the Supreme Court had held that the Interstate Commerce Commission was a body corporate with legal capacity to be a party plaintiff or defendant in the Federal courts, and that consequently, suit to set aside orders of the Commission had been brought against the Commission, said (Op. Cit. page 6):

> "The bill terminates this condition by requiring all proceedings to review orders of the Commission to be brought against the United States and by vesting the control of all such proceedings in the Department of Justice."

See also Congressional Record, Volume 45, pp. 157 f, 5514-5522, 5522-5523, 6346-6347, 6391, 6457-6462.

Cf. *Interstate Commerce Commission* v. *Oregon-Washington R. Co.*, 288 U. S. 14, 22-23.

[12] Intervention presupposes a suit properly brought. See the cases cited in footnote 32, p. 51, *infra*.

pear and answer, and quite a different meaning in a case in which the Interstate Commerce Commission fails or refuses to appear. The appearance of the Interstate Commerce Commission and the intervention of the railroads are fortuitous circumstances in the sense that neither act could be compelled by the appellant; the only person the United States can possibly have the right to sue in this proceeding is the United States. Thus, the assertion by the United States of the right to sue the United States raises a question that must be decided quite apart from and without regard to the wholly voluntary appearance of the Interstate Commerce Commission and the intervening railroads.'

Since a suit to enjoin or set aside an order of the Interstate Commerce Commission must be brought against the United States (and cannot be brought as of right against anyone else), it follows that the appellant is urging upon this Court a construction of the statute that would make it possible for litigation to arise in which the United States would be at once the only plaintiff and the only defendant and in which the Attorney General would be required to represent both sides of the controversy.

The requirement of the Urgent Deficiencies Act that a suit to enjoin or set aside an order of the Interstate Commerce Commission shall be brought against the United States is in itself enough to require the rejection of appellant's contention that the United States is entitled to maintain this action. It is no answer to the language of the statute to say, as appellant does, "The matter is a practical one, which should be governed by realities and not by technicalities or legal fictions," and that "the practical fact here is that the United States is the plaintiff, and in no real sense a defendant." (Appellant's Brief, p. 29) The notion, implicit in these statements, that the United States, as a legal entity, has legal interests hostile to those of the Interstate Commerce Commission cannot be reconciled with the provisions of the Interstate Commerce Act and the Urgent Deficiencies Act, nor can it be reconciled with what

would seem to be the obvious fact that when the Interstate Commerce Commission makes an order it acts as an agency of the United States, its action is the action of the United States, and the United States, as a sovereign, has a direct and substantial interest in sustaining the validity of the order.[14]

Furthermore, the assertion that the United States is the plaintiff in this action and is "in no real sense a defendant" is hardly consistent with what appellant chooses to regard as the "realities" of the litigation. If we are to adopt the appellant's theory that the United States has a multiple and divisible legal personality and that the interests of different agencies and departments of the Federal Government must be regarded as diverse and separate for the purposes of litigation, then this action must be regarded as an action in which the War Department is the plaintiff and the Interstate Commerce Commission is the defendant. Viewed in that light plaintiff's contention amounts to this: that the Urgent Deficiencies Act authorizes the Attorney General, acting in the name of the United States, but at the behest of some department or agency of the Federal Government that is aggrieved by an order of the Interstate Commerce Commission, and who is in fact the real party in interest (in this case the War Department), to bring a suit, in the name of the United States, and nominally against the United States, but in fact against the Interstate Commerce Commission, to enjoin or set aside the Commission's order.

This construction of the statute involves two erroneous assumptions: (1) That the requirement of the Urgent Deficiencies Act that a suit to enjoin or set aside an order of the Interstate Commerce Commission shall be brought against the United States is a purely formal requirement that may be complied with and then disregarded and (2) That the provisions of the Judicial Code and Urgent Deficiencies Act are intended to authorize the

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[14] See pp. 37-38, *infra*.

various agencies and departments of the Federal Government to institute judicial proceedings in the name of the United States to annul orders of the Interstate Commerce Commission.

So far as concerns the first of these assumptions this Court has refused to accept the contention that the requirement that suit must be brought against the United States is purely formal or nominal in character. In *North Dakota v. Chicago & N. W. Ry. Co.*, 257 U. S. 485, the State of North Dakota instituted an original action in the Supreme Court to enjoin the enforcement of an order of the Commission. In support of its suit, the State argued that the statute did not provide the exclusive method of review and that an action to set aside an order of the Commission did not have to be brought against the United States. The Supreme Court rejected the State's argument saying (257 U. S. at p. 490):

> "As to public policy, Congress has indicated the policy of the United States. For although it is argued that the requirement that the United States should be made a party is a mere matter of procedure for the purpose of giving the Department of Justice control, we cannot limit the significance of the Judicial Code, § 211, by such a speculation. The language of the section shows that public interests were before the mind of Congress, and that in its opinion an order made in the public interest should not be hindered from going into effect until the representative of the public had been heard. It appears to us that this view is so reasonable that it should be accepted by this Court even if not bound."

The second assumption implicit in appellant's argument, that is, that Congress has authorized litigation between the several agencies and departments of the Federal Government and the Interstate Commerce Commission, cannot be reconciled with the provisions of the statute. If Congress had intended to authorize litigation between the various agencies and departments of the Executive Branch of the

Government and the Interstate Commerce Commission surely it would not have provided, as it did in the Urgent Deficiencies Act, that a suit to enjoin or set aside an order of the Commission should be brought against the United States.

Apart from the requirement that the suit be brought against the United States there is another provision of the statute that is inconsistent with the notion that Congress intended to authorize litigation between the agencies and departments of the Executive Branch of the Government, on the one hand, and the Interstate Commerce Commission, on the other. Sections 212 and 213 of the Judicial Code (28 U. S. C. 45a) provide that "the Attorney General shall have charge and control of the interests of the Government" in any case brought to enjoin or set aside an order of the Interstate Commerce Commission.[15] It is inconceivable that Congress would have inserted this provision in a statute that was intended to authorize litigation between the United States and the Interstate Commerce Commission. If the statute authorizes such litigation, where can it be said that the interests of the Government lie? Is the Attorney General acting in the interests of the Government when, on behalf of the United States as petitioner, he attacks the Commission's order? Is he acting in the interests of the Government when, on behalf of the United States as defendant, he stands neutral? Are the interests of the Interstate Commerce Commission as defendant the interests of the Government, or are the interests of the Interstate Commerce Commission adverse to those of the Government?

The inference to be drawn from the fact that the statute directs that the Attorney General shall have charge and control of "the interests of the Government" is not weakened by those provisions of the Judicial Code and the Urgent Deficiencies Act (referred to in Appellant's Brief, pp. 21-23)

[15] The substance of this provision is now contained in 28 U. S. C. 2323.

which give to the Interstate Commerce Commission and other interested parties the right to intervene and to participate in the proceeding through their own counsel, and which provide that the Attorney General shall not dispose of or discontinue the suit over the objection of any party who has so intervened (See Sections 212 and 213 of the Judicial Code, 28 U. S. C. 45a)[16] These provisions of the statute define with particularity the extent to which the Interstate Commerce Commission may be regarded as a separate and distinct entity with power to act independently of the Attorney General in litigation brought to attack the validity of its orders. The language of these provisions does not authorize a suit to be brought either by or against the Interstate Commerce Commission, nor does the language give anyone the right to sue the Interstate Commerce Commission or the right to compel the Interstate Commerce Commission to come into court to defend its orders. The fact that Congress defined with particularity and without ambiguity the extent to which the Commission may act independently in litigation is in itself a reason for rejecting a broader interpretation of the statute that would permit the United States or any agency or department of the Government to sue the Interstate Commerce Commission as a separate and distinct entity.

In the single instance in which the Congress has chosen to authorize an agency of the Government to bring judicial proceedings to attack orders of the Interstate Commerce Commission, Congress conferred that authority in plain and explicit terms. Section 201 of the Agricultural Adjustment Act of 1938, 7 U. S. C. 1291, provides:

> "(a) the Secretary of Agriculture is authorized to make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, and to prosecute the same before the Commission. Before hearing or disposing of any complaint (filed by

[16] See 28 U. S. C. 2323.

any person other than the Secretary) with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, the Commission shall cause the Secretary to be notified, and, upon application by the Secretary, shall permit the Secretary to appear and be heard.

"(b) if such rate, charge, tariff, or practice complained of is one affecting the public interest, upon application by the Secretary, the Commission shall make the Secretary a party to the proceeding. In such case the Secretary shall have the rights of a party before the Commission and the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination. The liability of the Secretary in any such case shall extend only to liability for court costs."

It should be noted that this statute provides that in certain circumstances the Secretary shall have "the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination." [17] It is not necessary in this case to determine the scope or the meaning of this language.[18] The significant fact is that there is no comparable or analogous language in the Interstate Commerce Act, the Judicial Code or the Urgent Deficiencies Act that authorizes the United States, or any of its agencies or departments, to bring suit to enjoin or set aside an order of the Interstate Commerce Commission.[19]

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[17] It is significant that the statute provides that the Secretary shall be liable for court costs; the United States never incurs liability for costs.

[18] Cf. *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, discussed at pp. 40-41, *infra*.

[19] The provisions of the Agricultural Adjustment Act of 1938 may be compared with Section 16 of the Bituminous Coal Act of 1937 (15 U. S. C. 846) and Section 1 of the Stabilization Act of 1942 (50 U. S. C. App. 961) which authorized Government agencies to participate in proceedings before the Interstate Commerce Com-

The legislative history of the Mann-Elkins Act supports the conclusion that the United States is not authorized to bring suit to strike down an order of the Interstate Commerce Commission. The provisions of the statute that give the Attorney General control of the litigation and that permit the Interstate Commerce Commission to appear as of right were thoroughly debated in Congress at the time that the Mann-Elkins Act was passed. The requirement of the statute that suits to enjoin the orders of the Commission be brought against the United States and the provision that the litigation should be under the control of the Attorney General were attacked vigorously by members of both Houses of Congress who were in favor of amending the bill so as to provide that the suits should be brought against the Interstate Commerce Commisssion *eo. nomine* and should be defended by the Commission itself, and not by the Attorney General. Attempts to amend the bill so as to provide that the suits should be brought against, and defended by, the Commission were defeated on the floor of both Houses.[20] The present provision of the law giving

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mission. Neither Section 16 of the Bituminous Coal Act nor Section 1 of the Stabilization Act of 1942 authorized the Government agency involved to seek judicial review of a Commission order.

No reported case has been discovered in which the Bituminous Coal Commission, or the Director of the Office of Price Administration, or the Director of Economic Stabilization sought to bring a suit under the Urgent Deficiencies Act to enjoin, suspend, set aside, or annul an order of the Interstate Commerce Commission. The Price Administrator attacked orders of the Interstate Commerce Commission in *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, and *North Carolina* v. *United States*, 325 U. S. 507, but in each of these cases the proceeding to enjoin or set aside the Commission's order was initiated by another.

[20] 45 Congressional Record 5514-5522, 5522-5523, 6346-6347, 6389-6409, 6444-6462.

It is significant that in the 80th Congress the Committee on Judiciary of the House of Representatives, acting on the recommendation of the Attorney General, refused to recommend legislation

the Interstate Commerce Commission the right to appear in any litigation in which the validity of one of its orders is attacked was adopted as a compromise to satisfy those members of Congress who feared that the Attorney General might not always vigorously defend orders of the Commission.

In the course of a protracted debate, in which all aspects of this problem were discussed, no member of Congress suggested that it was the intention of Congress to authorize the Attorney General to institute suit against the Interstate Commerce Commission to invalidate the Commission's orders. On the contrary, the debates are replete with statements that it was the duty of the Attorney General to defend the Commission's orders in all circumstances.[21] The

providing that hereafter proceedings to enjoin orders of the Interstate Commerce Commission should be brought against the Commission and defended by the Commission. See House Report No. 1019, 80th Congress, Second Session, on H. R. 1468.

[21] Senator Root, who was active in behalf of the bill was particularly explicit on this point. Senator Bristow of Kansas raised the question whether the Attorney General would be required to defend an order of the Commission if he believed that the order was not justified. The following colloquy ensued (45 Congressional Record 4104):

> "MR. ROOT. Mr. President, I will answer that without any hesitation or doubt. The Attorney-General would be bound upon all and the highest considerations of his professional honor and his official duty to defend the order of the Interstate Commerce Commission in all courts having jurisdiction to review it.
>
> "MR. BRISTOW. Then, he would not have any supervisory authority as to whether or not it should be defended?
>
> "MR. ROOT. Certainly not. It is his business to defend. He is no judge; he is no legislator; he is no reviewing authority."

Another significant colloquy occurred between Senator Heyburn of Idaho and Senator Cummins. Senator Heyburn commented on

debates also contain numerous statements by members of Congress showing that they assumed that there was iden-

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that provision of the bill which provided that all suits which theretofore had been brought by or against the Interstate Commerce Commission should be brought by or against the United States. His comments led to the following colloquy with Senator Cummins (45 Congressional Record 6461):

"MR. HEYBURN. May it not occur that the United States, represented by the Attorney-General, would be attacking the Interstate Commerce Commission, for the language here is 'by or against the United States?' It would certainly be intolerable to have one of the branches of the Government attacking another branch in the courts.

"MR. CUMMINS. Precisely. I think, not under the second paragraph conferring jurisdiction upon the court of commerce, but upon other branches of the law and upon other subjects, the very situation which the Senator from Idaho has suggested may arise.

"MR. HEYBURN. Under Section 4, under the provision that—

"From and after the passage of this act all cases and proceedings in the court of commerce which, but for this act, would be brought by or against the Interstate Commerce Commission shall be brought by or against the United States.

"I have some difficulty in adjusting the language 'shall be brought by or against the United States.' Then it goes on to provide for the Attorney-General representing the cause. Suppose this suit attacking the judgment of the Interstate Commerce Commission is brought against the United States in what position would the Interstate Commerce Commission be placed? It would be defending against a proceeding brought by the United States in effect.

"MR. CUMMINS. Mr. President, I can not conceive of any such suit as that just mentioned by the Senator from Idaho."

See also 45 Congressional Record 1574, 4938, 5232, 5416, 6456.

tity, and not diversity, of interest between the United States and the Interstate Commerce Commission.[22]

There is no substance in appellant's contention that the legislative history of the Mann-Elkins Act shows that Congress contemplated that the United States might bring suits to set aside the Commission's orders. In support of this argument appellant makes two points: In the first place appellant refers to the fact that an amendment that would have required the Attorney General to defend the Commission's orders in all cases was rejected on the floor of the House of Representatives. (Appellant's Brief pp. 19-21, fn. 7) The fact is that this amendment had nothing to do with the question whether the United States should be authorized to institute suits attacking the orders of the Interstate Commerce Commission and the Congressional debate on this amendment supplies no justification for the inference that appellant seeks to draw.[23]

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[22] See Congressional Record, Volume 45, pp. 4104, 4938, 5516, 5517; Part 6, 6391, 6457. On this point, Senator Sutherland of Utah said (op. cit. 6457):

> "When the Interstate Commerce Commission after a hearing makes an order it becomes in substance and effect an order of the Government of the United States."

[23] Appellant's inference seems to be that the amendment was defeated because the members of the House of Representatives believed that the Attorney General should be free to institute suits attacking the Commission's orders. The fact is that it is not possible to determine with precision the grounds on which the amendment was rejected. Some members of the House objected to the amendment on the ground that it was unnecessary and that it was the duty of the Attorney General to defend the Commission's orders in any event (45 Congressional Record 5525). Even Representative Norris who opposed the amendment said that in his judgment it "adds absolutely nothing in effect to the bill * * *" (45 Congressional Record 5526). The amendment also provided that every order of the Commission "shall be presumed to be lawful and proper". Some members objected to this pre-

In the second place appellant argues that the fact that the bill was amended to permit the Interstate Commerce Commission to intervene and to appear in defense of its own orders shows that the Congress intended to authorize the United States to bring suits attacking the orders of the Commission (Appellant's Brief, pp. 24-25). An examination of the legislative history of the statute shows that this amendment was adopted as a compromise between a group of members of Congress who feared that the Attorney General might not always be vigorous in defense of the Commission's orders and therefore wished to give the Commission sole responsibility for the defense of its orders, and another group who believed that the Attorney General should have complete control of the defense of the Commission's orders.[24] As between the two groups there was no difference of opinion on the principle that the orders of the Commission should be vigorously defended. It would doubtless come as a surprise to the members of both groups to learn that their resolve that the orders of the Commission should be vigorously and strongly defended is now construed as evidence of an intent to authorize the Attorney General to institute suits to invalidate the Commission's orders.

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sumption (45 Congressional Record 5527) and it may be assumed that they voted against the amendment on that ground. Some members objected to the amendment on the ground that if a shipper attacked an order made by the Commission the Attorney General should be free to decide for himself whether he would defend the order. Those who took this position, however, made it clear that they were thinking of cases in which a shipper instituted a judicial proceeding attacking the Commission's order. There was no suggestion that the Attorney General could initiate a suit to strike down the Commission's order. (45 Congressional Record 5525-5527).

[24] 45 Congressional Record, 4514, 4604-4607, 5514-5523, 6346-6347, 6389-6409, 6444-6462.

The appellant argues that the right of the United States to maintain this action is sustained by *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671 and *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567. In the first of these cases the Inland Waterways Corporation brought suit against the United States under the Urgent Deficiencies Act to set aside an order of the Commission. In the second case the Inland Waterways Corporation and the Secretary of Agriculture brought separate suits attacking an order of the Interstate Commerce Commission. In neither of these cases was the question of the jurisdiction of the court to entertain a suit brought by the United States, or one of its instrumentalities, against the United States to set aside an order of the Interstate Commerce Commission raised, briefed or argued either in the lower court or in this Court. In fact, in the *Mechling* case the brief filed on behalf of the United States and the Department of Agriculture in this Court stated: "* * * The right of the United States to bring suit in the first instance * * * is not presented in this case."[25] Accordingly, these decisions cannot be regarded as authoritative on the jurisdictional issue now presented. *Ayrshire Corp.* v. *United States*, 331 U. S. 132, 137.[26] In any event it should be noted

[25] See brief for the United States and the Department of Agriculture in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, at p. 12, fn. 18.

[26] In *Ayrshire Corp* v. *United States*, 331 U. S. 132, 137, this Court, in dealing with another question arising under the Urgent Deficiencies Act, said:

> "The mere fact that the case was entertained by this Court is no basis for considering it as authoritative on the jurisdictional issue, it being the firm policy of this Court not to recognize the exercise of jurisdiction as precedent where the issue was ignored. *United States* v. *More*, 3 Cranch 159, 172; *Snow* v. *United States*, 118 U. S. 346, 354-355; *Cross* v. *Burke*, 146 U. S. 82, 87; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, 236; *Arant* v. *Lane*, 245 U. S. 166, 170."

that the Inland Waterways Corporation is specifically authorized by statute to sue, and to be sued, in its corporate name, (See 49 U. S. C. 155 (b)) and that the suit brought by the Secretary of Agriculture in the *Mechling* case was specifically authorized by Section 201 of the Agricultural Adjustment Act of 1938, 7 U. S. C. 1291, which has been discussed at pp. 33-34, *supra*. In each of these cases, therefore, it was possible to find Congressional authorization for suit which is lacking in the case at bar.[27]

The appellant also points out that in a number of cases the Attorney General has aligned himself on the side of a plaintiff who has been attacking the validity of orders of the Interstate Commerce Commission and asserts that this action "has neither been questioned nor criticized by this court." (Appellant's Brief, p. 25). But in all of the cases

[27] The appellant also cites *United States* v. *Public Utilities Commission*, 151 F. (2d) 609 (App. D. C. 1945). The jurisdictional issue was not raised or argued in that case. Accordingly, the principle announced in *Ayrshire Corp.* v. *United States*, 331 U. S. 132, 137 applies. (See Footnote 26, p. 40, *supra*) In any event, the statute involved in the *Public Utilities Commission* case differed substantially from the statutes under consideration here. In that case, the Court of Appeals for the District of Columbia held that the United States was entitled, as a consumer of electric power, to maintain an appeal under Section 43-705, D. C. Code (1940) which provides that "any public utility" or "any other person or corporation" affected by an order of the Public Utilities Commission of the District of Columbia may file a petition of appeal in the District Court of the United States for the District of Columbia. That statute did not require that the appeal be filed against the United States. On the contrary, the appellate procedure was conducted against the Public Utilities Commission *eo nomine*. There is no basis for assuming, as petitioner does, that the Court of Appeals would have decided the case as it did if the statute involved had required that the proceeding be instituted against the United States.

of this kind cited by appellant (except *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671 and *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567) the suit was instituted by a private person pursuant to the specific authorization of the Urgent Deficiencies Act. The fact that in cases in which the institution of a suit by a private person was plainly authorized by statute, the Attorney General has chosen not to defend the Commission's orders; has no logical relationship to the proposition that the Attorney General, acting in the name of the United States, is authorized to institute a suit against the United States to invalidate an order of the Interstate Commerce Commission. In short, these cases have no relevancy to the issue of the right of the United States to sue itself to set aside an order of the Interstate Commerce Commission.

Finding no comfort in the words of the Interstate Commerce Act, the Judicial Code, or the Urgent Deficiencies Act, or in the legislative history of these statutes, the appellant seeks to support the asserted right of the United States to maintain this action by an appeal to considerations of expediency. Appellant asserts that the United States is one of the largest shippers and that it is not to be assumed that Congress "intended to withhold from the United States, where its own pecuniary interests are directly or substantially involved, the right of review which has been conferred upon private parties." (Appellant's Brief, p. 16) This is an argument that the statute should be construed so as to give to the United States a remedy that is available to all other shippers.

It cannot be assumed, however, that Congress intended to permit the United States to bring a suit under the Urgent Deficiencies Act to enjoin or set aside an order of the Commission merely because every other shipper has that remedy. An examination of the provisions of the Interstate Commerce Act shows that Congress did not intend

to treat the United States and all other shippers alike.[25] The statute gives to the United States a number of advantages that are not available to private shippers. For example, under Section 22 of the Interstate Commerce Act the United States may enjoy rates that are lower than those in the published tariffs that are charged all other shippers. The right of the United States to bargain for and to receive the benefit of rates lower than those charged other shippers is also recognized by Section 321 of Title 3 of the Transportation Act of 1940 (49 U. S. C. 65). Section 322 of the same statute gives the United States the right, not given to private shippers, to deduct the amount of any overpayment to a carrier from any amounts subsequently found to be due to the carrier (49 U. S. C. 66). Under Section 3(2) of the Interstate Commerce Act (49 U. S. C. 3(2)) the United States, and its departments and agencies, unlike all other shippers, may make arrangements with the carriers for the transportation of freight on credit. The existence of these statutory provisions that give to the United States benefits and advantages not enjoyed by a private shipper, is inconsistent with the assumption that Congress intended that the United States and all other shippers should be on a plane of absolute equality.

The argument that the United States must have the right to institute a suit to enjoin or set aside an order of the Interstate Commerce Commission because every other shipper has that remedy is the same kind of

[25] As to a remedy that the statute gives to both the United States and private shippers, the United States must take the remedy on the same basis and subject to the same restrictions that apply in the case of a private shipper, but that is not to say that the United States and private shippers stand on the same plane so far as concerns the existence of rights and remedies under the statute. The United States has rights and remedies not available to private shippers; on the other hand the right to resort to the court to annul an order of the Commission is a right that has been conferred on private shippers and not on the United States.

argument that the Supreme Court rejected in *United States v. Cooper Corp.*, 312 U. S. 600. In that case the Court held that Section 7 of the Sherman Act does not permit the United States to bring a suit for triple damages even though that remedy is open to every other natural and corporate person in the United States. There the Government argued (as appellant argues in this case) that Congress could not have intended to deny the United States a remedy that was available to private persons. The Court rejected this contention. The Court pointed out that the Sherman Act gave to the Government certain remedies that were not available to private persons, and then said (312 U. S. 600, at p. 608)[29]

> "* * * we cannot hold that since a private purchaser is given a remedy for his losses in treble damages, the United States should be awarded the same remedy."

The argument in this brief has been made with particular reference to the words of the relevant statutes and to the legislative history of the statutes. The statement of the argument in these terms should not be permitted to obscure the fact that this attempt of the United States to attack an order made by one of its own agencies raises an important issue of public policy. The Interstate Commerce Commission is the body that Congress has created and authorized to regulate the transportation industry in accordance with

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[29] Appellant attempts to distinguish the *Cooper* case by asserting that, unlike the Sherman Act, "the terms and history of the Urgent Deficiencies Act do not indicate a purpose to deprive the United States of the right to seek review of Commission orders in circumstances where that right is available to all other shippers." (Appellant's Brief, p. 18). Appellant overlooks the fact that the argument made on behalf of the United States in the *Cooper* case was stronger in one important respect than the argument that appellant makes in the instant case: In the *Cooper* case this Court could have upheld the right of the United States to sue without holding that the United States was authorized to institute a suit against itself.

standards that Congress has prescribed. There is nothing novel or startling in the suggestion that when the Commission acts within the sphere of its authority its determinations are authoritative and final in so far as they touch the financial interests of other agencies and departments of the Government. Congress has not heretofore adopted the policy of permitting or authorizing departments or agencies of the Executive Branch of the Government to resort to the Federal courts to invalidate orders issued by the regulatory agencies that Congress itself has established merely because those orders happen to affect adversely the financial interests of the departments or agencies. It is conceivable that Congress itself, by statute, might abandon or modify this policy. But any proposal to do so, either generally or with reference to particular situations, would raise important questions of principle and practice that only Congress can properly answer. The nature of these questions can be illustrated by a reference to the instant case.

Under what conditions and in what circumstances is the Attorney General entitled to sue to enjoin the enforcement of an order made by the Interstate Commerce Commission? Can such a suit be brought whenever the Attorney General believes that the Interstate Commerce Commission has not correctly appraised the facts in a particular situation or has made an error of law, without regard to whether the financial interests of some branch or agency of the Government are injured, or can the Attorney General act only at the behest of an agency of the Government that can prove a financial interest comparable to the interest that must be shown by a private person who wishes to attack the Commission's order? Who is to decide whether the suit is to be brought—the agency that asserts it has been injured by the Commission's order, or the Attorney General? What part is the Attorney General to play in such litigation? Is he to be required to represent the complaining agency or is he to be required to defend the order of the Interstate Commerce Commission? What are the interests of the United States in such litigation and who is to speak for the United States?

The acceptance of the strained and incongruous interpretation of the Urgent Deficiencies Act that appellant is now urging upon this Court will create a situation in which these questions will require answers. These are not questions that can be answered by reference to the provisions of the Interstate Commerce Act, the Judicial Code, or the Urgent Deficiencies Act in their present form. They are questions that are essentially legislative in character and that call for the judgment of Congress. The fact that the questions are not resolved by the statutes suggests that Congress never intended to authorize the kind of litigation that has been attempted in this case and the fact that appellant's contention raises these questions and, if accepted, will require their decision, shows that appellant is now asking this Court to engage in the declaration of legislative policy.

II. An Action by the United States Against the United States and the Interstate Commerce Commission to Enjoin and Set Aside an Order of the Commission Does Not Present a Justiciable Case or Controversy.

In the preceding section of the brief we have pointed out that the language of the Judicial Code and the Urgent Deficiencies Act and the legislative history of those statutes, taken together, show that Congress has not authorized the United States to sue the United States for the purpose of enjoining or setting aside an order of the Interstate Commerce Commission. Apart from the language of these statutes and their legislative history there is another reason for rejecting appellant's construction of the statutes. Litigation in which the United States attempts to sue the United States and the Interstate Commerce Commission does not present a case or controversy within the meaning of Article III, Section 2 of the Constitution, which defines the boundaries of Federal judicial power.

There cannot be a justiciable controversy unless there are separate and distinct parties with adverse legal inter-

ests that are affected by the dispute that is to be adjudicated. There are two aspects of this principle that are important in the instant case. In the first place there must be diversity of parties; the same person cannot be both plaintiff and defendant at the same time in the same action. *Lord* v. *Veazie*, 8 How. 251; *Cleveland* v. *Chamberlain*, 1 Black 419; *Wood-Paper Company* v. *Heft*, 8 Wall. 333; *Phoenix Insurance Co.* v. *Erie Transportation Co.*, 117 U.S. 312-322. In the second place, there must be a real diversity of legal interests; it is not enough for different parties to be before the court, or for a dispute to be presented to the court if, in fact, the litigants or disputants represent the same legal entity or interest. In short, the courts will look beyond the parties who appear in the litigation to determine whether in fact they represent different and adverse legal interests. *Wood-Paper Company* v. *Heft*, 8 Wall. 333; *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U.S. 300; *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 241. Cf. *Indianapolis* v. *Chase National Bank*, 314 U.S. 63.

In reliance upon the principle that a justiciable controversy requires the presence of separate and distinct parties with adverse legal interests, the lower Federal courts have held, in cases analogous to the case at bar, that an instrumentality of the United States cannot bring an action against the United States and that one agency of the United States cannot bring an action against another. *Globe & Rutgers Fire Insurance Co.* v. *Hines*, 273 Fed. 774 (C.C.A. 2d 1921) *cert. den.* 257 U.S. 643; *Defense Supplies Corp.* v. *United States*, 148 F. (2d) 311 (C.C.A. 2d 1945), *cert. den.* 326 U.S. 746; *Defense Supplies Corp.* v. *American-Hawaiian S. S. Corp.*, 64 F. Supp. 459 (S.D.N.Y. 1945).[30]

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[30] In *Defense Supplies Corp.* v. *United States*, 148 F. (2d) 311 (C. C. A. 2d 1945), *cert. den.* 326 U. S. 746, an action was brought by Defense Supplies Corporation, an instrumentality of the United States, against the United States, under the Suits in Admiralty Act, to recover the value of a cargo damaged in shipment on a vessel owned by the United States. The court, dismissing the action on the ground that it was in reality a suit by the United States against itself, said (pp. 312-313):

The action that the United States is attempting to maintain here does not satisfy the standards that should be applied to determine the existence of a justiciable controversy. There is no difference in identity between the United States as plaintiff, on the one hand, and the United States and the Interstate Commerce Commission as defendants, on the other. The diversity of identity necessary to sustain jurisdiction cannot be manufactured by the device of naming the Interstate Commerce Commission as a defendant. The fact is that the provisions of the Judicial Code and the Urgent Deficiencies Act do not give the United States, or any other plaintiff, the right to name the Interstate Commerce Commission as a defendant in a suit brought to attack one of the Commission's orders. In the

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"It seems clear to us that the complete ownership of the Defense Supplies Corporation by the United States shows this to be nothing more than an action by the United States against the United States. The Act would appear to contemplate no such action. Sections 1 and 2 indicate that the United States shall be the defendant. And section 3 states that such suits as are brought under the Act shall proceed according to the principles of law and rules of practice obtaining in like cases between private parties. In private litigation the plaintiff and defendant cannot be the same. For, in that event, there is no real case or controversy. We conclude, therefore, that the Defense Supplies Corporation cannot maintain a suit against the United States under the Suits in Admiralty Act."

In its brief appellant asserts that *Davis* v. *Donovan*, 265 U. S. 257, casts doubt upon the validity of the *Globe & Rutgers* case. The decision in the *Davis* case and in *Missouri-Pac. R. R. Co.* v. *Ault*, 256 U. S. 554 (which the *Davis* case followed and applied) turned on the construction given by this Court to the statutes regulating suits by and against the railroads after they were taken over by the United States in the first World War. These decisions cast no doubt on the general principle that a suit by the United States against itself or against one of its agencies or departments does not raise a justiciable case or controversy.

Mann-Elkins Act Congress expressly provided that any suit to set aside an order of the Interstate Commerce Commission must be brought against the United States. The avowed purpose of this provision of the statute was to reverse the prior holding of this Court in *Texas and Pac. Railway* v. *Interstate Commerce Commission*, 162 U.S. 197, that the Interstate Commerce Commission was a body corporate with legal capacity to be a party plaintiff or defendant in the Federal courts. See pp. 27-28, *supra*. The fact that the Interstate Commerce Commission is given an independent status for certain limited purposes in litigations involving the validity of its orders (see pp. 32-33, *supra*) does not in any way impair the validity of the conclusion that Congress has provided that the Commission shall not be regarded as an independent legal entity for the purpose of the institution of litigation attacking the validity of its orders.

But even if it should be assumed that the United States and the Interstate Commerce Commission can properly be regarded as separate and distinct legal entities for the purpose of this litigation, the appellant's action would nevertheless not present a justiciable controversy because there can be no diversity of legal interest between the United States as plaintiff, on the one hand, and the United States and the Interstate Commerce Commission as defendants, on the other. It is true that the order of the Interstate Commerce Commission that appellant seeks to review is an order that denies the War Department reparation and thereby adversely affects the financial interests of that Department. But it is equally true that the order made by the Interstate Commerce Commission is an order that it made as an agency of the United States and on behalf of the United States. Appellant seems to assume that financial interest of the War Department is one of the "actualities" of the litigation, but that the interest of the United States as a sovereign in the validity of the orders of the Interstate Commerce Commission is a mere form or fiction

that can be disregarded. There is no rational basis for this assumption. It may be doubted whether it is proper to regard the United States as possessing a multiple personality or to make a distinction between those actions that the United States takes in its governmental capacity and those that it takes in its proprietary capacity. Cf. *Graves* v. *N. Y., ex rel. O'Keefe*, 306 U.S. 466, 477; *Fed. Land Bank* v. *Bismarck Co.*, 314 U.S. 95, 102. But even if this distinction is assumed to have vitality, neither logic nor authority supports appellant's assumption that the financial interests of the War Department are by definition the interests of the United States while the interest of the Interstate Commerce Commission in the validity of its order is in some way different from and adverse to the interests of the United States. There is no escape from the conclusion that the financial interest of the War Department and the interest of the Interstate Commerce Commission in the defense of its orders are both interests of the United States and that because of this identity of interest as between the plaintiff and the defendants in this litigation there exists no cause or controversy of which the Federal courts can properly take cognizance.

In dealing with this aspect of the case appellant casts its argument in a form designed to create the impression that the justiciable controversy in this case is between the United States, on the one hand, and the intervening railroads, on the other. But the United States did not bring this action against the intervening railroads; it did not name the intervening railroads as defendants and it did not ask the court below to grant it relief as against the intervenors. The statute does not authorize the United States or any other plaintiff to sue railroads for the purpose of enjoining or setting aside an order of the Interstate Commerce Commission. The fact is that in the particular circumstance of this case there is no affirmative relief as against the intervening railroads that the United

States could appropriately have sought or that the court below was competent to give.[31]

Admittedly the intervening railroads and the War Department were engaged in a controversy before the Interstate Commerce Commission, but this controversy is not now before the Court for decision. That controversy was terminated by the Commission's order which was, in itself, an exercise of the sovereign power of the United States. When the United States resorted to the district court for relief its attack was directed against the order made by the Interstate Commerce Commission and not against the intervening railroads. We submit that the jurisdictional question should be decided by reference to the character and purpose of the cause of action that the United States is now attempting to assert and that the character and the purpose of that cause of action cannot be transformed so as to meet the requirements of the Constitution merely by reason of the fact that the institution of the action was preceded by a dispute between the War Department and the intervening railroads.[32]

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[31] The intervening railroads were not threatening to take any affirmative action on the basis of the Commission's order which the United States could ask the court below to enjoin, nor did the Commission's order confer any affirmative rights upon the intervening railroads. The only effect of the Commission's order was to deny the request of the War Department that it be awarded reparations.

[32] There is another reason for rejecting the suggestion that the intervention of the railroads has created a justiciable controversy. Intervention cannot confer jurisdiction if a justiciable controversy did not exist in the original action. Intervention presupposes an action duly brought. If jurisdiction is lacking at the commencement of the suit, it cannot be conferred by intervention. *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 501; *Texas Cement Co.* v. *McCord*, 233 U. S. 157, 163-164; *Light Boudoir Co.* v. *Karatz*, 262 U. S. 77, 85-86; *Pianta* v. *H. M. Reich Co.*, 77 F. (2d) 888, 890 (C. C. A. 2nd 1935) *Kendrick* v. *Kendrick*, 16 F. (2d) 744 (C. C. A. 5th 1926) *cert. den.* 273 U. S. 758; *Cohn* v. *Cities Service Co.*, 45 F. (2d) 687 (C. C. A. 2nd 1930); *Ford, Bacon & Davis* v. *Volker*

The decisions cited by appellant do not support the conclusion that this case presents a justiciable cause or controversy. Three cases upon which appellant particularly relies are *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, and *United States* v. *Public Utilities Commission*, 151 F. (2d) 609 (App. D. C. 1945). In not one of these cases was the question of the existence of a justiciable cause or controversy raised, briefed or argued. For that reason these cases cannot be regarded as authoritative on the jurisdictional issue, it being the firm policy of this Court not to recognize the exercise of jurisdiction as precedent where the issue was ignored. *Ayrshire Corp.* v. *United States*, 330 U.S. 132, 137, fn. 2.[33]

The appellant also cites a number of other cases involving the validity of Commission orders in which the Attorney General has refused to join in the appeal, has taken a

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tice, 64 F. (2d) 800, 801 (C. C. A. 5th 1933); *Hill* v. *Wilson*, 210 Fed. 200 (C. C. A. 5th 1914); see Levi and Moore, *"Federal Intervention: The Procedure, Statutes and Federal Jurisdictional Requirement,"* 47 Yale L. J. 898, 910, *et seq.* and Moore, *Federal Practice*, II, 2378.

[33] Both *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, and *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, involved separate actions that were consolidated. In each case one of the actions was brought by a private person and admittedly presented a justiciable cause or controversy. In the *Inland Waterways* case several elevator companies brought an action to annul the Commission's order and this action was consolidated with the separate action brought by the Inland Waterways Corporation (see record in *United States* v. *Inland Waterways Corp.*, No. 175, October Term, 1942). In the *Mechling* case, the Mechling Barge Line Company brought an action to annul the Commission's order. This action was consolidated with separate actions brought by the Inland Waterways Corporation and the Secretary of Agriculture (Record in *United States* v. *Mechling*, No. 72, October Term, 19[illegible]).

neutral position or has attacked the validity of the Commission's order. (See Appellant's Brief, p. 35). In these other cases, however, the action was instituted by private persons whose legal interests were adversely affected by the order of the Interstate Commerce Commission and whose standing to sue could not be questioned under the Urgent Deficiencies Act. In cases of this kind a justiciable controversy existed between the private persons who instituted the litigation, on the one hand, and the United States, on the other. The fact that the Attorney General declined to defend the Commission's order in these cases is not relevant to the question of the existence of a justiciable cause or controversy. If a justiciable controversy exists, different agencies of the Government may appear in that controversy and express conflicting views on the issues involved. But in such a situation the justiciable controversy is not created by the conflicting views of the Government agencies; it has an independent origin.[34]

[34] *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, is a good illustration of a case of this kind. There the Commission authorized a fare increase by the Hudson & Manhattan Railroad. Suit was brought by Jersey City against the United States to set aside and enjoin the order. The Economic Stabilization Director intervened under the authority of Section 1 of the Stabilization Act (50 U. S. C. App. 961) and joined in the attack on the order on the ground that the Commission had failed to give proper consideration to the inflationary aspect of the order. The Commission and the carriers filed answers. The United States filed a "neutral answer" because two federal agencies were in opposition. No question of the existence of a justiciable controversy arose. There a controversy in the constitutional sense existed between Jersey City, on the one hand, and the United States as defendant, on the other; the fact that the Economic Stabilization Director intervened in the controversy on behalf of Jersey City did not destroy the court's jurisdiction. This case also illustrates the principle that the question whether a case or controversy exists must be determined by the identity of the original parties to the litigation, and not by reference to the identity of intervening par-

III. The Appellant Having Elected to Seek Reparation from the Interstate Commerce Commission in the First Instance is Now Barred by Section 9 of the Interstate Commerce Act from Obtaining Judicial Review of the Commission's Order Denying the Relief Sought.

The complaint that the appellant filed with the Interstate Commerce Commission not only asked the Commission to make an administrative determination with respect to the legality of the practices of the railroads at Norfolk, but also asked the Commission to award the War Department reparation for damages said to have been suffered by reason of the alleged unlawful conduct of the railroads. The Commission denied appellant's prayer for reparation and it is that determination that appellant now seeks to have reviewed by the courts.[35]

A litigant who submits a claim for reparation to the Interstate Commerce Commission in the first instance cannot obtain judicial review of the Commission's order denying the relief sought. This conclusion is required by the language of Section 9 of the Interstate Commerce Act. That section provides that a person who claims to have been injured by reason of a violation of the Act may seek damages either before the Commission or in a suit in a United States district court, but that the person "shall not have the right to pursue both of said remedies and must in each

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ties. *Interstate Commerce Commission* v. *Oregon-Washington R. Co.*, 288 U. S. 14, 22; *Interstate Commerce Commission* v. *Columbus & Greenville Ry.*, 319 U. S. 551; *North Carolina* v. *United States*, 325 U. S. 507; *Alabama* v. *United States*, 325 U. S. 535; *McLean Trucking Co.* v. *United States*, 321 U. S. 67, and *American Trucking Assns.* v. *United States*, 326 U. S. 77, were all cases of this kind.

[35] When the Commission's order was entered, the purpose of the proceeding before the Commission was for reparation only and the Commission so found. (R. 108)

case elect which of the two methods of procedure herein provided for he will adopt.

For many years this Court has consistently held that a person who chooses to resort to the Commission to recover damages in the first instance has made his election under Section 9 and is not entitled to judicial review of an order of the Commission that denies his prayer for relief. *Standard Oil Co. v. United States*, 283 U. S. 235; *Brady v. Interstate Commerce Commission*, 43 F. (2d) 847 (N.D. W.Va. 1930), aff. *per curiam* 283 U.S. 804; *George Allison & Co. v. United States*, 12 F. Supp. 862 (S.D. N.Y. 1935), aff. *per curiam* 296 U.S. 546; *Cramer v. United States*, 23 F. Supp. 690 (E.D. Mo. 1938), aff. 305 U.S. 567; *Atlantic Lumber Corporation v. Southern Pac. Co.*, 47 F. Supp. 511 (D. Ore. 1942); *Ashland Coal & Ice Co. v. United States*, 61 F. Supp. 708 (E.D. Va. 1945), aff. *per curiam* 325 U.S. 840. And see *Terminal Warehouse v. Penn. R. Co.*, 297 U.S. 500, 507-508.

In certain of these cases the negative order doctrine (first established in *Procter & Gamble v. United States*, 225 U.S. 282) was an alternative ground of decision. See for example *Standard Oil Co. v. United States*, 283 U.S. 235, 238. But the courts' interpretation and application of Section 9 of the Interstate Commerce Act did not depend upon the negative order doctrine, but rested rather upon the plain import of the words of the section. The decision of this Court in *Rochester Telephone Corp. v. United States*, 307 U.S. 125, discarding the negative order doctrine as the test of jurisdiction to review orders of the Interstate Commerce Commission, did not destroy the authority of the earlier decisions in so far as those decisions interpreted and applied Section 9. In its opinion in the *Rochester Telephone Corp.* case this Court recognized that the decision in the *Standard Oil* case did not depend primarily upon the negative order doctrine, and indicated that the review and rejection of the negative order doctrine was

not intended to impair the interpretation and application of Section 9 made in the *Standard Oil* case.[36]

Six years after its decision in the *Rochester Telephone Corp.* case, this Court affirmed *per curiam*, on the authority of the *Standard Oil* case, a decision by a three-judge court, convened under the Urgent Deficiencies Act, holding that a litigant who sought damages in the first instance before the Commission could not obtain judicial review of an order denying his prayer for relief.[37] *Ashland Coal & Ice Co.* v. *United States*, 325 U.S. 840.

Appellant attempts to overcome this substantial and long established body of authority by an argument that proceeds along two lines. In the first place appellant argues that "Section 9 refers to alternative jurisdictions (*sic*) of cases seeking an award of damages, and not to suits instituted under the Urgent Deficieneies Act seeking review of the Commission's action on claims presented to it under § 13 of the Interstate Commerce Act (49 U.S.C. § 13)." (Appellant's Brief, p. 49). No decision of this Court lends any support to this construction of Section 9. On the contrary, the decisions cited at p. 55, *supra*, were all cases in which the courts interpreted the election of remedies provision of Section 9 as applying to a suit brought under the Urgent Deficiencies Act to review an order of the Commission. The words of Section 9 refer to "any District Court or Circuit Court of the United

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[36] In *Rochester Telephone Corp.* v. *United States*, the Court, commenting on the *Standard Oil* case, said (307 U. S. 125, 140, fn. 23):

> "*Standard Oil Co.* v. *United States*, 283 U. S. 235, held not reviewable the action of the Commission refusing to grant reparations, but the main basis of the decision was not the 'negative order' doctrine but the statutory scheme dealing with reparations."

[37] The affirmance by this Court of the decision of the district court in the *Ashland Coal & Ice Co.* case is flatly inconsistent with the contentions made by appellant. Appellant's recourse is to suggest that the *Ashland Coal & Ice Co.* case was overruled *sub silentio* by this Court in *El Dorado Oil Works* v. *United States*, 328 U. S. 12. For a discussion of this point see pp. 62-64, *infra*.

States of competent jurisdiction" without drawing any distinction between an ordinary district court and a district court convened under the Urgent Deficiencies Act, or between "original jurisdiction" and jurisdiction to review orders of the Commission. If Congress had intended to write into Section 9 the distinction now suggested by appellant it would have done so by the use of apt and explicit language.

In the second place appellant argues that if Section 9 is to be construed as denying review under the Urgent Deficiencies Act in any circumstances, the Section can only apply in those cases in which the litigant is not required to resort in the first instance to the Interstate Commerce Commission by the primary jurisdiction doctrine, developed and applied in such cases as *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 and *Armour & Co.* v. *Alton R. Co.*, 312 U.S. 195. (Appellant's Brief, p. 53). As applied to the instant case appellant's argument is that the election of remedies provision of Section 9 does not apply because under the primary jurisdiction doctrine the appellant had no choice but to submit its claim for reparation to the Interstate Commerce Commission and hence had no real opportunity to elect its remedy.[38]

[38] The same argument was pressed upon this Court by the appellant in *Ashland Coal & Ice Co.* v. *United States*, 325 U. S. 840. There the appellant had asked the Commission for reparation for rates charged in the past that were alleged to have been unreasonable. The Commission denied reparation. Since reparation was sought on the ground that the rates had been unreasonable an administrative question was raised which under the primary jurisdiction doctrine had to be submitted in the first instance to the Commission. In its brief submitted in this Court the appellant argued that Section 9 did not apply and that the *Standard Oil* decision was not controlling because appellant had no real election of remedies, but was required to proceed initially before the Commission (See Brief for the Appellant in *Ashland Coal & Ice Co.* v. *United States*, No. 1287, October Term 1944, pp. 4-8). This Court rejected that contention and affirmed the decision of the court below on the authority of the *Standard Oil* case (325 U. S. 840).

This argument is based on a misconception of the nature of the rule of primary jurisdiction. That rule does not require a complainant to submit a claim for damages to the Interstate Commerce Commission in the first instance. The rule is that if the claim for damages requires the decision of a question which Congress has committed to the administrative judgment of the Commission, then there must be preliminary resort to the Commission for the decision of *that administrative question*. The point that appellant overlooks is that it is the administrative question and not the claim for damages that must be submitted in the first instance to the Commission. The decisions of this Court that developed and applied the primary jurisdiction doctrine were not intended to repeal or to amend Section 9 by deleting the provision for election of remedies. On the contrary, in its opinions discussing the primary jurisdiction doctrine, this Court has frequently recognized that the election given to the litigant by Section 9 has not been destroyed and that a litigant is always free to withhold his claim for damages and to submit that claim to the Federal courts on the basis of the Commission's determination of the administrative question. *Mitchell Coal Co.* v. *Penna. R. Co.*, 230 U.S. 247, 257; *Penna. R.R.* v. *Puritan Coal Co.*, 237 U.S. 121, 131; *Terminal Warehouse* v. *Penn. R. Co.*, 297 U.S. 500, 507-508. See also *Geo. A. Hormel & Co.* v. *C. M. St. P. & P. Ry. Co.*, 283 Fed. 915 (C.C.A. 8th 1922); *Hillsdale Coal & Coke Co.* v. *Penna. R. R. Co.*, 237 Fed. 272 (E.D.Pa. 1916); *Minds* v. *Penna. R. Co.*, 237 Fed. 267 (E.D. Pa. 1916) aff. 244 Fed. 53 (C.C.A. 3rd); *Powrys* v. *Cady*, 9 F. (2d) 458 (W.D. La. 1925).[39]

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[39] The following passage from the opinin in *Minds* v. *Pennsylvania R. Co.*, 237 Fed. 267 (E. D. Pa. 1916) contains a well considered statement of the rule (269-270).

> "The administrative questions must be first determined by the Commission, because, if an action were brought at law, without this first finding, the plaintiff could not make out his case. His real option is this: He may submit the administra-

That the primary jurisdiction doctrine does not compel a litigant to submit his prayer for reparation to the Interstate Commerce Commission, but only requires him to obtain a determination by the Interstate Commerce Commission of the administrative questions raised by his claim before he resorts to the courts, is indicated by a passage

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tive question alone to the Commission, and thus, having established his right to recover his damages, may bring his action at law, and prove both his injury and the amount of his damages, or he may exercise the right given him by the statute by submitting both questions to the Commission. If he takes the first course, the action is one for damages and subject to well-known rules. If he takes the second course (as these plaintiffs did) what results? Had the right of trial by jury not been involved, Congress would doubtless have given the award of the Commission the effect of a judgment. The complainant, being a volunteer, is concluded by what the Commission does. The defendant is not concluded. If the defendant complies with the order, the plaintiff is done. If the order is not complied with, the plaintiff may have recourse to the courts (federal or state), [illegible] forth his injury, the fact of his complaint to the Commission, and the order made thereon, and that it has not been complied with. In the words of the statute, the cause then proceeds as an action for damages, except that the findings of the Commission are made evidence, and the defendant must pay costs and counsel fees."

Compare the statement in *Stamps* v. *Chicago, R. I. & P. Ry. Co.*, 253 I.C.C. 557, 559 (1942):

"Where, as here, an issue as to the past is presented involving questions essentially of fact and of our administrative discretion, it is well settled that a finding must be here sought before the jurisdiction of the Federal court may be invoked. Under section 9 of the act, complainant may elect either to (1) seek a finding here, and, when we have declared the practice to have been unlawful, seek damages in the courts, or (2) seek a finding and reparation order here, and, if the order is not obeyed, sue on it in the courts."

in the opinion in *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, the decision in which the primary jurisdiction doctrine was first announced and applied. The significant point about this passage is that it speaks in terms of a limitation of the right of a person "originally" to maintain actions in the courts and in terms of a limitation of the power of the courts "primarily" to hear complaints that require the decision of questions committed to the administrative judgment of the Commission. The passage follows (204 U.S. at p. 442):

> "In other words, we think that it inevitably follows from the context of the act that the independent right of an individual *originally* to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission and, therefore, does not imply power in a court to *primarily* hear complaints concerning wrongs of the character of the one here complained of." (Italics supplied)

It is difficult to reconcile appellant's insistence that it was required by the primary jurisdiction doctrine to submit its claim for damages to the Commission with some of the arguments advanced by appellant in its attack on the merits of the Commission's order. For example, the appellant asserts that it was an error of law for the Commission to conclude that the railroads were under no legal duty to provide piers and handling services on export traffic. (Appellant's Brief, p. 66, *et seq.*). To the extent that appellant relies upon a purely legal argument of this character its claim for damages would seem to raise a question that does not fall within the scope of the primary jurisdiction doctrine. Another argument made by appellant in attacking the Commission's order is that the Commission's interpretation of the railroads' tariffs was erroneous as a matter of law. Indeed, appellant asserts in this connection

that the interpretation of the tariffs "involved no determination of fact," and that "only a question of law was presented." (Appellant's Brief, p. 73). A decision as to the meaning of the words used in a tariff which raises only a question of law is a question which the courts are competent to decide and which need not be submitted in the first instance to the Commission. See *Gt. No. Ry.* v. *Merchants Elev. Co.*, 259 U.S. 285, 291-292.

But even if it is assumed that appellant's claim for damages raised questions that had to be determined in the first instance by the Commission, the appellant was still free to pursue the claim for damages before the courts and not before the Commission. Thus, the appellant might have submitted to the Commission solely those administrative questions which fall within the primary jurisdiction of the Commission (for example, the question whether the practices of the carriers were unreasonable and discriminatory) withholding for decision by the courts the War Department's claim for damages. If appellant had pursued this course, it would have preserved its right to pursue its claim for damages in the courts in the event that the Commission's determination was adverse to the carriers.

The decisions indicate that if because of the possibility that the statute of limitations might run, or for any other reason, it would have been a hardship, or otherwise inappropriate, to require appellant to resort in the first instance to the Commission another course of action would have been open to appellant.[49] In such circumstances appellant could have instituted its action in the district court and then asked to have that action stayed pending a determination of the administrative question by the Interstate Commerce Commission. *Southern Railway Co.* v. *Tift*, 206 U.S. 428, 434; *Mitchell Coal Co.* v. *Penna. R. Co.*, 230 U.S. 247, 266-267; *Tank Car Corp.* v. *Terminal Co.*, 308 U.S. 422. The appellant contends that *Armour & Co.* v. *Alton*

[49] Appellant does not suggest that any such conditions of hardship existed in this case.

R. Co., 312 U.S. 195, shows that appellant could not have pursued this course of action. The question was not considered by this Court in the *Armour* case and there is nothing in the opinion in that case to suggest that this Court intended to overrule the decisions that have been cited above or to hold that a plaintiff would not be permitted, if he showed hardship or other appropriate circumstances, to institute the action first in the district court and to have the action suspended pending a determination of the administrative questions by the Commission.[41]

To support its argument that the order of the Commission in the instant case is reviewable, appellant relies upon the decision of this Court in *El Dorado Oil Works* v. *United States*, 328 U.S. 12. That case did not raise any question as to the meaning or application of Section 9 of the Interstate Commerce Act. In that case, an ordinary suit in contract had been brought in a Federal district court to recover amounts alleged to be due under a lease of tank cars. The defendant in the litigation had refused to pay the amount in controversy on the ground that if it did so it would be paying rebates in violation of the provisions of the Interstate Commerce Act. This Court held that the question whether the payments called for by the contract violated the Interstate Commerce Act was an administrative question that was primarily subject to the authority of the Interstate Commerce Commission and that the proceeding in the district court should be stayed pending a decision of that question by the Commission. *Tank Car Corp.* v. *Terminal Co.*, 308 U.S. 422.

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[41] In *Armour & Co.* v. *Alton R. Co.*, 312 U.S. 195, the Circuit Court of Appeals rejected a request by the plaintiff that the action in the district court be suspended pending a determination by the Commission. It did so on the ground that the plaintiff had failed to show hardship or other reason for dealing with the case in that way. 111 F. (2d) 913 (C.C.A. 7th 1940). The plaintiff did not seek review of that part of the decision of the Circuit Court in its petition for a writ of certiorari.

The plaintiff in the litigation thereupon instituted a proceeding before the Interstate Commerce Commission to obtain a determination of the legality of the payments called for by the contract. In the proceeding before the Commission the plaintiff did not seek reparation. In that proceeding the Interstate Commerce Commission decided that the payment of the amounts sought by the plaintiff in the litigation in the district court would be unjust, unreasonable and unlawful under the Interstate Commerce Act. On the basis of this determination, the Commission ordered the proceeding before it to be discontinued. This Court held that the Commission's determination was reviewable under the Urgent Deficiencies Act.

In the *El Dorado* case, the plaintiff in the litigation was attempting to enforce a right that arose under a contract and not under the provisions of the Interstate Commerce Act. No question arose or could arise in that case about the meaning or application of Section 9, and no suggestion could properly be made that the plaintiff was required to make the election of remedies provided for by Section 9.[12] The decision cannot be regarded as holding that a person who seeks damages in the first instance before the Interstate Commerce Commission can bring a suit under the

[12] In its opinion the Court did not cite or discuss *Standard Oil Co.* v. *United States* or any of the other cases relating to the election of remedies provided for by Section 9.

In the *El Dorado* case the Attorney General filed in this Court a memorandum on behalf of the United States and the Interstate Commerce Commission drawing an analogy between the function exercised by the Commission in the *El Dorado* case and the function exercised by the Commission in reparation cases under Section 9. (Appellant's Brief, p. 40). The memorandum did not refer to or discuss the question of election of remedies under Section 9; that question was not raised in the *El Dorado* case. In its opinion the Supreme Court did not discuss the remote analogy suggested by the Attorney General. The submission of the memorandum is hardly an adequate basis for suggesting that in the *El Dorado* case this Court intended to consider the interpretation or application of Section 9.

Urgent Deficiencies Act to obtain judicial review of the order of the Commission denying his prayer for damages.[43] The decision does suggest that a person who does not seek damages before the Interstate Commerce Commission but who submits to the Commission only an administrative question, with a view to obtaining a determination that can be used in litigation in a district court may, if the Commission's decision is adverse to his claim, obtain review under the Urgent Deficiencies Act; otherwise the decision has no relevance to the issues in the case at bar.

The issue raised by appellant's attack on the accepted construction of Section 9 of the Interstate Commerce Act is purely an issue of statutory construction. Appellant does not attack Section 9 on constitutional grounds; attack on that ground would be inadmissible because Congress may, without violation of the Constitution, give finality to a determination of the Interstate Commerce Commission denying reparation. See *Butte, Anaconda & Pac. Ry. Co.* v. *United States*, 290 U.S. 127; *Switchmen's Union* v. *Board*, 320 U.S. 297. The construction of Section 9 which appellant attacks has been followed by the Interstate Commerce Commission,[44] by the Attorney General[45] and by the

[43] The argument that this Court in the *El Dorado* case overruled, *sub silentio*, *Standard Oil Co.* v. *United States*, 283 U.S. 235, and *Ashland Coal & Ice Co.* v. *United States*, 325 U.S. 840, was rejected by a district court specially constituted under the Urgent Deficiencies Act, in *Great Lakes Steel Corporation* v. *United States*, 81 F. Supp. 450 (E.D. Mich. 1948).

[44] See *Stamps* v. *Chicago, R. I. & P. Ry. Co.*, 253 I. C. C. 557 (1942).

[45] In the cases cited on p. 55, *supra*, the Attorney General, acting on behalf of the United States as statutory defendant, consistently took the position that Section 9 of the Interstate Commerce Act bars review of an order denying reparation. The Attorney General took this position in *Ashland Coal & Ice Co.* v. *United States*, 61 F. Supp. 708 (E. D. Va. 1945), aff. *per curiam* 325 U. S. 840, after the decision in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. In *Great Lakes Steel Corporation*

courts[46] for many years. In this period of time Congress has on several occasions amended and revised the Interstate Commerce Act, but it has never seen fit to make substantial changes in the provisions of Section 9. In these circumstances if appellant believes that a construction of Section 9 which follows the plain and obvious import of the Section's words brings anomalous results, appellant's proper recourse is to Congress. Compare *Francis* v. *Southern Pacific Co.*, 333 U.S. 445, 449.

IV. The Commission's Conclusions Are Based Upon Adequate Findings, Supported by Substantial Evidence, and Are Not Contrary to Law; Therefore They May Not Be Set Aside by the Court.

A. The Scope of Judicial Review.

It is well settled that an order of the Commission is subject only to limited review in the courts and that the case is not to be heard and decided on its merits *de novo*. If the Court determines (1) that the Commission made findings sufficient to indicate the basis for its conclusions, (2) that such findings have some substantial support in the record, and (3) that the Commission has not misapplied law, the power of review is exhausted. The Court "will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling." *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U.S. 541, 547.

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v. *United States*, 81 F. Supp. 450 (E. D. Mich. 1948), the Attorney General took this position in the district court subsequent to the decision of this Court in *El Dorado Oil Works* v. *United States*, 328 U. S. 12 (See pp. 7-22 of the brief filed for the United States and the Interstate Commerce Commission in *Great Lakes Steel Corporation* v. *United States, et al.*, in the District Court for the Eastern District of Michigan, Southern Division, Civil Action No. 6295).

[46] See cases cited on p. 55, *supra*.

The principle was stated in *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 139-140, as follows:

> "Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable."

The findings necessary in a Commission report of the type now under review need not be set out with formality, nor expressed in terms which courts generally employ, but may be "interwoven with other matter." *Meeker & Co. v. Lehigh Valley R. R.*, 236 U.S. 412, 428; *United States v. B. & O. R. Co.*, 293 U.S. 454, 465. The Commission has interwoven its findings with a discussion of the evidence in its reports in this proceeding but its findings and conclusions are nonetheless definite and dispositive of all points in issue, and the United States has raised no question with respect to the form or meaning of the findings.

In its brief the United States recognizes that the scope of judicial review is narrow, stating the rule as follows, at page 48:

> "It has long been well established that in cases brought under the Urgent Deficiencies Act, the power of the District Courts is limited to determination of whether there has been violation of the Constitution, failure to conform to statutory authority, or the arbitrary exercise of power."

As errors of law the Government designates two findings of the Commission, to wit, the conclusion that the railroads have no obligation to provide piers for the interchange of rail freight with vessel, and the conclusion that published tariffs did not have the effect of including terminal services in the line haul rates. With respect to other findings of the Commission the contention is that they lack a "rational basis". There is no argument that the findings of this lat-

ter class are not supported by evidence, but the Court is asked to weigh the evidence, to examine the reasoning processes of the Commission (with special emphasis on the reasoning of dissenting Commissioners) and to exercise an independent judgment in reaching contrary conclusions. This method of attack is not within the scope of review of administrative orders as it seeks to substitute the judgment of the Court for that of the Commission. As stated by Chief Justice Stone in *Medo Corp.* v. *Labor Board*, 321 U.S. 678, 681, fn. 1:

> "It has now long been settled that findings of the Board, as with those of other administrative agencies, are conclusive upon reviewing courts when supported by evidence, that the weighing of conflicting evidence is for the Board and not for the courts, that the inferences from the evidence are to be drawn by the Board and not by the courts, save only as questions of law are raised and that upon such questions of law, the experienced judgment of the Board is entitled to great weight."

B. The Legal Issues Involved in the Complaint to the Commission.

At the outset it is important to keep in mind that the Commission acts under specific provisions of the law that it administers. It cannot award reparation under general principles of law or broad rules of equity but must deal with the more precise issues of tariff interpretation, reasonableness of rates, or discrimination under definite provisions of the Act. Before both the Commission and the district court, the United States argued its claim for reparation largely on the theory of equitable considerations, such as "unjust enrichment", *e.g.*, that if the Army had not taken over the Norfolk piers for handling its own freight, the railroads would have continued to operate the piers as in the past, at a cost of four cents per hundred pounds of freight; therefore, since the railroads were relieved of this cost, they should not be permitted to "re-

tain the four cents, but should reimburse the Army exactly as they otherwise would have compensated their agent. While the Commission dealt with this argument and specifically found that the four-cent cost was not included in the charges levied on Army freight, and thus the saving to the railroads was not milked from the Army, it disposed of the complaint, as required by statute to do, under the specific sections of the Act alleged to have been violated.

The complaint alleged the violation of Sections 1(5)(a), 1(6), 2, 6(8) and 15(13) of the Interstate Commerce Act, the essential issues being raised under Sections 1 and 2 which together require just, reasonable and non-discriminatory rates and practices. No effort was made by the Government to prove that the rates themselves were unreasonable under Section 1, or that rates reduced by four cents per hundred pounds would still be reasonable. The absence of any such evidence was noted in the reports of the Commission. (R. 97, 108) In fact, this issue was characterized as "immaterial" by Government counsel. (R. 559) On the other hand, much of the Government's argument before the Commission suggested a question of tariff interpretation, an issue arising under Section 6(7) of the Act, although this paragraph was not pleaded in the complaint, and the Government's tariff expert made no such contention at the hearing. (R. 212) All of the negotiations prior to litigation were based on a demand for the publication of new tariff provisions, not that existing tariffs required the payment of allowances. (R. 365, 369, 370, 372) Nevertheless, the initial report of Division 2, and subsequently the dissenting opinions of the same Commissioners, dealt particularly with a violation of Section 6(7), and the Government devotes a chapter of its brief to this question, despite the apparent disclaimer at page 73:

> "The Government's contention was that the railroads had violated the Interstate Commerce Act when they failed and refused to make adequate provision in their tariffs for such an allowance."

The remaining issues raised by the complaint, namely, the alleged violation of Sections 6(8) and 15(13) of the Act add nothing of substance in support of the claim for reparation. Section 6(8) merely requires the railroads in time of war to facilitate and expedite military traffic. It provides no basis for the payment of reparation because of rates charged, and no such order has ever been made under that section. It was pleaded only to bolster a contention that the railroads should have paid the Government certain refunds in time of war which would not have been made to any shipper in time of peace, that is to say, that the Army should have been treated more liberally from a revenue standpoint.

Section 15(13) requires the publication in tariffs of allowances to shippers and authorizes the Commission to determine the reasonable limits of such payments. Its purpose is to permit the payment of allowances to shippers for performing a part of the railroads' transportation obligation and to prevent the payment of unauthorized or exorbitant allowances, *i.e.*, rebates, but it gives no shipper the right to volunteer to take over a part of the transportation obligation for his own convenience and thus exact a refund from the railroads. *Atchison Railway Co.* v. *United States*, 232 U.S. 199. Section 15(13) provides no basis for an award of damages unless service performed by a shipper is part of the railroad obligation, and unless the shipper, in addition to performing the service, also pays the railroad for performing it. Since the contention was, as quoted above, that the railroads had failed to make provision in their tariffs for such payment, not that they had committed themselves to paying allowances, damages could be awarded only on a showing that the Army had paid excessive charges. Thus, disposition of the issue arising under Section 15(13) was dependent on findings that the charges were unreasonable or discriminatory under Sections 1 or 2.

freight. The railroads denied the request on the ground that it was not the practice to pay allowances to shippers for supplying their own services of this character, and that the railroad obligation was limited to actual performance by themselves of the services on railroad or public terminals. Ultimately, the Government filed its complaint with the Commission alleging that it was an unreasonable and discriminatory practice for the railroads to refuse to make an allowance to the Army and that, as a result, the line-haul freight rates were unreasonable and discriminatory.

In substance, and stripped of legal terminology, the case presented to the Commission was that when the Army took over the piers for its own purposes it was entitled to payments of (1) the same wharfage or rental costs as incurred by the railroads when the facility was a railroad terminal, *i.e.*, one cent per hundred pounds of freight, and (2) the same unloading cost incurred by the railroads when their agent unloaded freight in railroad custody, *i.e.*, three cents per hundred pounds. In short, the contention was that the railroads had an obligation to provide the Army with piers for its exclusive use (being the same piers from which the railroad agent had been ejected) and to hire the Army to unload its own freight. Cloaked in various disguises, the arguments of counsel have a different sound, but this is the essence of the case and the Commission so found.

2. Background of the Port Practices.

Ordinarily, the railroads do not unload carload freight as this is the obligation of the shipper. See *Barringer & Co. v. United States*, 319 U. S. 1, 3. Nevertheless, under special circumstances, they may do so, as illustrated in the *Barringer* case and other cases therein cited, either with or without any change in the applicable freight rates. The extra service may be accorded to some shippers or certain types of freight and not to others, although the same rates

are charged, and the resulting disparity is not *ipso facto* unlawful. Disparity of this kind must be judged under the specific mandates of the Interstate Commerce Act, especially Sections 1, 2 and 3, and the question is usually presented under Section 3 (the undue prejudice and preference proviso) which was not pleaded in this case because it requires proof of competition with other shippers.

One of the exceptions to the established custom is the free unloading of export freight by the railroads on public piers, *i.e.*, piers operated by railroads, steamship companies or public wharfingers. The practice varies slightly at the different ports. For example, at Baltimore the privilege is accorded only on railroad piers; at Wilmington, Delaware, only on a municipal pier, whereas at Philadelphia the several types are used, railroad, steamship and other public piers. (R. 289) The fact that the privilege is so limited has never been held to violate the law because the railroads have the right to select their own agencies and facilities, provided they are open to equal use by all shippers alike. (R. 93)

The unloading privilege is not extended in any event to private piers, by which is meant piers owned or operated by shippers for handling their own freight. Such piers are characterized as "private" because they are not open to all shippers on equal terms; they lack the attributes of public utilities. (R. 304-306) There are many such piers along the Atlantic seaboard and freight passing over them is not unloaded by the railroads, although it moves on the export rates provided there is direct transfer from car to ship, *i.e.*, that the shipper does not take custody of the freight and thus interfere with the continuity of movement. (R. 455) These are significant points in this proceeding because, as will be shown, the Army not only operated its own pier at Norfolk but it took custody of the freight. In similar circumstances, other shippers would not receive either the unloading service or the export rates, but the latter were accorded to the Army, contrary to the usual

the concentration over a limited number of piers, and the conservation of revenue. For example, freight coming into the possession of the owner is regarded as domesticated and is not entitled to the privileges accorded water-borne freight. Ordinarily carriers cannot handle freight over private piers at their convenience and economical handling cannot be achieved if freight is widely dispersed over many piers. Defendants are fearful that if they are required to perform the transfer services at the piers of Atlantic Terminals, Incorporated, such action will result in extension of the practice beyond reasonable bounds. They show that there are numerous companies at Port Newark and other ports with private facilities along the water front which, by the formation of a pier company or public terminal, would be in a position to demand the performance of the transfer services. At the time of the hearing, a new terminal company had been formed to operate on the property of a large shipper at Port Newark and had sought an extension of railroad services to its piers."

In that proceeding the Commission found that the railroad's refusal to handle freight between the cars and ships at Newark, N. J., on the shipper's own pier while it performed the service on public piers on traffic moving on the same rates was not unreasonable or discriminatory. Commenting on that finding in the report now under review, the Commission said: "The facts there are similar to those here". (R. 95)

In *City of Newark* v. *Pennsylvania R. Co.*, 182 I. C. C. 51 (1932), the Commission, although requiring the removal of undue prejudice in loading practices under Section 3, limited its order to railroad piers on the finding that it was not the practice at other ports to perform the service or pay allowances on piers controlled by shippers. Subsequently, the issue arose again in *Newark, N. J., Cham. of Com.* v. *Pennsylvania R. Co.*, 206 I. C. C. 555 (1935), and the Commission held that the issue could not be sustained with respect to private piers. In *M'Cormick Warehouse*

Court in *United States* v. *Am. Tin Plate Co.*, 301 U. S. 402; *United States* v. *Pan American Corp.*, 304 U. S. 156; *United States* v. *Wabash R. Co.*, 321 U. S. 403.

Furthermore, the findings of the Commission on this point are final, as the court stated in the cases cited. See the *Wabash* case, at page 408, where the Court said:

> "In sustaining the Commission's findings in these proceedings, as in related cases, this Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts if supported by evidence."

See also *Interstate Commerce Commission* v. *Hoboken R. Co.*, 320 U. S. 368, 378.

There is no room for the attempt of the United States to explain away this finding of the Commission on the ground that it applies only to land deliveries and not to deliveries on piers. The same principle applies. At some point the railroads' obligation ends and whether the shipment is consigned for delivery to an industry, a public terminal or a steamship pier, the party entitled to receive the shipment may terminate the railroads' obligation by interposing to take possession. The courts have not only applied the same principle but, indeed, the same specific "pronouncement" to pier deliveries. *Interstate Commerce Commission* v. *Hoboken R. Co.*, *supra*; *Parka Corporation of Baltimore* v. *Pennsylvania R. Co.*, 130 F. (2d) 804 (C. C. A. 4th 1942).

The Government's theory (Brief, p. 66) that railroads were under an obligation to provide the facilities and services necessary for the delivery of export traffic to connecting lines, *i.e.*, vessels, is beside the point. American railroads do not publish through rates with steamship companies to foreign ports and the Commission's authority under Part III of the Act does not extend to such commerce. Rail shipments are not consigned to foreign destinations like shipments to an off-line railroad station, and the railroads do not contract to deliver beyond the local port. Fur-

thermore, the vessels transporting the Army freight were not common carriers but were owned or chartered by the Government (R. 536), and thus were not connecting carriers in the usual sense. Nevertheless, assuming the contrary were true and that the railroads had a duty to deliver to vessels, it still does not follow that the railroads had any obligation to unload the cars. The cases cited by appellant say nothing about any such duty. Nor do they suggest that a railroad has any obligation to provide piers, a point that will be developed further in the next topic.

The Commission found that the Army traffic was "not export in the usual sense" (R. 91) and would not have been entitled to export rates except for a concession made by the railroads.[54] (R. 103) It found also that even with respect to usual export freight, the railroads have no obligation to provide the facilities and services for interchange with vessels, except to the limited extent provided in their tariffs. (R. 102)

4. The Obligation to Provide Piers.

The Commission found that there was "no showing that the defendants have failed to provide reasonable pier facilities, even assuming that they were legally bound to do so, which they deny, and rightfully so", (R. 93) and that it was not "the legal duty of the railroads to provide piers, which are essentially steamship facilities." (R. 102)

The lack of any obligation on the part of the railroads to perform a service, or to pay allowances in lieu thereof, is brought to a sharper focus in this case when consideration is directed to the wharfage problem as distinguished from unloading. After the Army had taken over the termi-

[54] It is not disputed in this proceeding that export rates would not have been applicable to freight consigned to the Army Base except for a special tariff provision. Nevertheless, it may be noted that the Commission ruled formally on this question in 1915, *United States* v. *Pennsylvania R. Co.*, 32 I. C. C. 730 (1915). The opinion is not printed in full but the Commission's decision was based on the Government's intervening custody of freight passing over a Navy pier.

C. THE COMMISSION'S CONCLUSION THAT THE FAILURE OF THE RAILROADS TO PAY THE ARMY AN ALLOWANCE FOR UNLOADING AND WHARFAGE SERVICES WAS NOT AN UNREASONABLE OR DISCRIMINATORY PRACTICE IS SUPPORTED BY SUBSTANTIAL EVIDENCE, AND IS NOT VITIATED BY ERROR OF LAW.

1. Summary of the Case Presented.

At Norfolk there are numerous private piers, railroad piers and other piers operated by public wharfingers. The largest facility (consisting of piers, warehouses and railroad tracks) is the so-called Army Base which, for many years prior to the war, was leased to and operated by a public wharfinger as a seaboard terminal. The Transport Trading and Terminal Corporation was the last of a succession of such terminal operators.

In order to make full use of this facility for railroad business, the railroads entered into arrangements with the terminal operator to act as their agent in providing railroad facilities and services. The arrangements were not joint but several, although generally similar, and in substance they constituted the terminal a railroad station and the terminal operator an agency of the railroads. (R. 88)

The purpose of the arrangements was to provide additional facilities where railroad freight could be transshipped between rail and vessel, as the export (and import) freight rates published by the railroads are applicable only when shipments do not pass from carrier possession. (R. 288) Otherwise, the continuity of movement is broken and the domestic freight rates, usually higher than export rates, apply. For the use of the facility, the railroads paid the terminal operator compensation measured by the amount of railroad freight passing over the piers, to wit, one cent per hundred pounds. This payment was characterized as "wharfage", which technically means the use of the surface of the pier, as distinguished from "dockage", which means the use of the berth by a ship. Actually the payment

was ordinary rental and, so far as legal requirements go, could have been made in a lump sum yearly amount or in any other way agreeable to the parties. Only they were concerned and the payment could have been more or less, as it was not subject to Commission or other regulation.

Likewise, the railroad paid the terminal operator three cents per hundred pounds for unloading certain freight from cars to pier. This payment was pursuant to an obligation undertaken in railroad tariffs to unload certain export freight on designated piers, including the facility operated by Transport Trading and Terminal Corporation, without expense to the shipper. This payment also was merely compensation to an agent for performing a railroad service and could have been measured in any other way agreeable to the parties, as it was not subject to regulation by law. Although it was sometimes termed an "allowance", it was not such in the usual sense, as referred to in Section 15(13) of the Act, since it was not a refund of part of the freight rate to shippers for performing part of the railroad transportation obligation with respect to their own freight.[47] (R. 305)

On June 15, 1942, the Army dispossessed the terminal operator and took possession of the facility for handling Government war freight, thus automatically terminating the railroad agency. Shortly thereafter, it notified the railroads that it desired to be paid the same compensation, to wit, four cents per hundred pounds, that had theretofore been made to the terminal operator. (R. 365, 370) The demand took the form of a request for the publication of allowances in the tariffs, which would have been the proper procedure had the railroads been obliged to compensate the Army for furnishing its own pier and unloading its own

[47] In *Handling Freight Between Ships and Cars at Ports*, 253 I. C. C. 371 (1942), the Commission noted that this type of payment is not a true allowance which requires tariff publication under 15(13).

rule, by special concession of the railroads." As found by the Commission at 264 I. C. C. 683, 686 (R. 51):

> "By a special tariff provision the defendants' export rates apply on the complainant's shipments, although the traffic is not export in the usual sense, as it passes into the possession of the complainant at points adjacent to the piers."

Again, referring to the same point, the Commission stated in its final report, 269 I. C. C. 141, 143 (R. 103):[49]

> "At the insistence of the complainant, therefore, the defendants included a provision in the tariffs to the effect that the export rates would apply also on shipments consigned to the United States Government and landed through Navy Bases, Navy Yards, or Army Bases for export to foreign countries. By reason of this provision the carriers apply the export rates on traffic moving over the Army Base Piers 1 and 2. There is nothing in the tariffs, however, that requires the defendants to pay the complainant an allowance for wharfage and handling traffic through the Army Base at Norfolk. The provision makes the export rates, but not the absorption arrangement, applicable. As the defendants rightly argue, the granting of one concession does not necessarily require another to the same party."

The reasons for restricting the unloading service to public piers are not difficult to understand. They are con-

[48] At pp. 92-93 of its brief, the United States construes the findings of the Commission as if they referred to the unusual volume and nature of the Government traffic, as distinguishing it from commercial traffic. It is entirely clear that the Commission was discussing the owner's custody of the freight at the port, which ordinarily would destroy its export character.

[49] The first five words of the quotation do not appear in the printed record due to a typographical error in the petition filed by the United States. The error was noted in the answer filed by intervenors in the district court. (R. 125)

sistent with the historical purpose of the practice which was simply to provide an interchange between rail and vessel which the shipper could not perform for himself, both because he was not present at the port and because the railroads could not permit shippers to interfere with the operation of the piers. In time the practice was extended beyond railroad piers to public piers for competitive reasons and to secure additional facilities for handling railroad business. There is no similar necessity for unloading when the shipper has his own pier and controls his own freight, with the advantages resulting therefrom, and the railroads have always declined to operate on such private piers. This has conserved their revenues which is a valid reason for the limitation in the absence of discrimination. Since nothing was added to the rates to compensate for unloading, thus making it, in a sense, a free service, the railroads would not willingly have extended the practice to private piers, and doubtless could have cured discrimination, had it been found to exist, by the establishment of a charge on their own piers as an alternative to providing the service on private piers.[30] The equal treatment provisions of law have required strict adherence to the established rules and practices so as not to create unlawful situations with respect to different shippers, and the Commission has consistently found over the years that the restriction of unloading service to public piers has a reasonable basis and has not resulted in discrimination. The Commission so found in this proceeding: (R. 102)

> "It is neither the legal duty of the railroads to provide piers, which are essentially steamship facilities, nor to load or unload carload freight except in unusual circumstances, such as livestock, or freight that is to be transshipped by the railroads or their agents. When

[30] Plus charges were published as a result of the Commission's decision in the *City of Newark* case, 182 I. C. C. 51 (1932), as explained in the *Weyerhaeuser* case, pp. 76-77, 469, both *infra*.

they obligate themselves to load or unload carload freight, the duty is established by tariff undertaking. In assuming that obligation with respect to export and import traffic, the carriers have restricted the practice to so-called public piers, that is, piers operated by railroads, steamship companies, or public wharfingers, and have excluded the so-called private piers, that is, piers operated by the owners of the freight. See *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.*, 229 I. C. C. 463.

The reference to the *Weyerhaeuser* case is significant as indicating that the problem had been considered by the Commission before, and it is a fact that similar issues had been presented in numerous cases and that the Commission was fully acquainted with the so-called port practices. In the *Weyerhaeuser* case, decided in 1938, the Commission had said (229 I. C. C. at pp. 472-473):

> "Under the present tariffs the rail carriers undertake to load and unload water-borne freight only at railroad or public piers, but in no event at piers controlled by the owners of the freight. At Baltimore the services are performed only at railroad piers, at Camden, Wilmington, and Trenton only at municipal piers, at Philadelphia at either railroad or municipal piers or at privately owned piers which are operated as public piers, but in no case will the service be performed at piers controlled by the owner of the traffic. At Chester the services are performed at a railroad facility and at the pier of a warehousing company, which is operated as a public facility, but the services are not performed on freight in which the warehousing company or its owner has an interest. . . .
>
> "The policy of defendants has been to restrict the port practices as much as possible, consistent with adequate service. Piers other than railroad piers are used only when necessary to supplement railroad facilities. In no case is the transfer service performed at a pier controlled by the owner of the traffic. The reasons for this policy are the difficulty of policing the practice, the necessity of performing the handling at the rail carriers' own convenience, the economy resulting from

Co. v. Pennsylvania R. Co., 191 I. C. C. 727 (1933) payment to a terminal operator for unloading services was prohibited on the ground that it was acting as the agent of shippers and thus that the custody of the freight would be that of the shipper. In such circumstances the proposed payment was characterized as a rebate, but the Commission pointed out that an arrangement would be lawful whereby the terminal was made an agency of the railroad and operated as a public freight station with railroad custody of the freight. At Norfolk, prior to June 15, 1942, the railroads had such an arrangement, but it was terminated when the Army took over the facility and placed itself in the exact position of the several shippers involved in the above proceedings.

The attitude of the railroads toward the Army's demands at Norfolk was strictly in line with their past practices at that and other Atlantic ports, and the disposition of the complaint by the Commission was consistent with its rulings in a long line of prior cases.[51] Since the earliest days of

[51] In addition to those cited, see other cases discussed at p. 88. The Government relies (Brief, p. 81) on *Elimination of New York, N. H. & H. R. Pier Stations*, 255 I. C. C. 305 (1943), as showing an inconsistency with the findings in the instant case, and thus demonstrating arbitrary action. The Commission gave the *New Haven* case full consideration. (R. 95).

That proceeding arose when the railroad attempted to eliminate certain piers as stations from its tariffs on the ground that Army traffic had become dominant and that the piers were no longer public facilities. The Commission ruled to the contrary, finding that the piers had retained their status as a commercial facility. The refusal to continue the service while at the same time absorbing the cost of unloading commercial traffic on other piers was regarded as prejudicial to commercial traffic. The case did not require either the unloading service or the payment of allowances on Army freight as sought in the instant proceeding.

In the *New Haven* case, the railroad was required to continue its service to commercial shippers on the pier in question but not to employ the Army for that purpose. This it was permitted to

the Commission, no problem has come more frequently to its attention than the export rates, involving the well-known port differentials, and thus the Commission has complete familiarity with the export rate adjustments and the practices attaching thereto.

3. The Army's Demand for Allowances.

The Commission found with respect to the unloading service that "obviously anything but operation by the complainant was impractical" (R. 90) and that "the defendants would not have been able to continue the work done formerly by the Transport Trading and Terminal Corporation at their convenience and to the satisfaction of the complainant". (R. 104) Also, that "defendants could not have performed the service individually but would have been obliged to pool their activities and operate as a unit under the complainant's control", which was beyond their legal obligation. (R. 90) And finally, wholly apart from the foregoing considerations, that the type of delivery demanded and accepted by the Army discharged the transportation obligation and relieved the railroads from any duty to unload the freight that they might otherwise have had. (R. 104-105)

If the railroads had any obligation with respect to Army freight, it was an obligation to perform service, not to pay

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do without Army interference. The Army, however, handled its own freight and as to that the railroad was not required to unload or pay allowances. At Norfolk, the situation is just the reverse. The Army not only took charge of and handled its own freight but also a small quantity of commercial freight that was permitted on the pier. The difference between the two situations is emphasized by the original report of Division 2 which, although finding that allowances should be paid on Army freight at Norfolk, specifically excluded the commercial freight. (R. 79) The United States has taken no exception to that ruling either before the Commission or the court.

allowances, and such an obligation carries with it the correlative right to render the service. *Atchison Railway Co.* v. *United States*, 232 U. S. 199. This principle is now recognized in the brief filed by the United States and, accordingly, it attempts to show that the railroads had an opportunity to render the service, but declined and, therefore, that the Army had no alternative but to demand allowances. This is a distorted picture of the true situation, as the railroads were not expected to render service and would not have been permitted to do so in any practicable manner. In dealing with this phase of the case, no departure is intended from the position already taken that there was no railroad obligation to unload Army freight on an Army pier.

Shortly after June 15, 1942, the Army, then being in control of the Army Base, made demand on the railroads to amend their tariffs to provide for the payment of allowances on Government freight. No claim was advanced that the United States was entitled to payment under existing tariffs, some of which continued to refer to the arrangements with the former terminal operator, Transport Trading and Terminal Corporation. On the contrary, the insistence was that the tariffs be changed. (R. 365, 369, 370) Representations made by the War Department are significant: "The terminal properties will be operated and controlled by the War Department. Use of the facilities by the other armed forces or by private concerns will be by the express permission of the War Department. * * * It is intended to use the terminal facilities for Government traffic only. However, circumstances may require the handling of commercial freight and in either instance the War Department or its agency will perform all services." (R. 369) "Army Base Piers No. 1 and 2 are the property of the Government and are operated by the War Department for its own exclusive use." (R. 371, 373)

For almost a year after negotiations were under way, no mention was made of anything but allowances and then, on May 1, 1943, the demand was broadened for the first time

to a request for performance of service, although qualified as a "prerequisite" to a complaint to the Commission. (R. 375) Subsequently, a similar demand without qualification followed. (R. 377) Nevertheless, when formal complaint was filed with the Commission on April 15, 1944, the Government having been in control of the property for almost two years, the allegations were limited to the failure to pay allowances. Contrary to the averment of the petition for review (R. 70) the complaint did not seek an order requiring the railroads to render service. (R. 150)

The Army never intended that the railroads should actually perform the unloading of Army freight. The evidence is clear that the Army did not desire service, that actual performance by the railroads would have been impracticable, and that it would not have been permitted by the Army subject to usual railroad standards and duties. (R. 173-178, 187, 188) The Commission so found and since its findings have substantial evidence in support thereof, there is no occasion to attempt to weigh opposing interpretations of the record.[52] Its conclusion was that "anything but operation by the complainant was impractical." (R. 90)

This is not to say that the railroads could not have rendered the service merely because of the increased volume of traffic. On the contrary, it was not the increased volume of traffic but the unusual methods adopted by the Army, entirely at variance with normal pier operations, which made service by the railroads not only impracticable from their standpoint, but undesirable to the Army. The very reasons which led the United States to take over the Army Base

[52] This type of finding, the Supreme Court has ruled, is a question of fact to be determined by the Commission and not the court. The ruling has been made in several case, cited at p. 84, *infra*, which applied the principle followed in *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, 29 (1935), see p. 83, *infra*.

proved this point,[53] as the United States would have secured railroad service in the customary manner if it had not ejected their agent from the property. Furthermore, all of the evidence recited by the Commission in support of its findings is taken from the testimony of Government witnesses.

The argument has been advanced that no change in the operation of the terminal occurred when the Army took over, that it used the personnel and equipment of the public terminal operator, and that everything proceeded as before except that the Army was in charge. The testimony of General Kilpatrick, the Commandant, reveals a far different situation. (R. 172-178, 187, 188) Furthermore, the Army required a different method of railroad delivery, having established a receiving yard where cars were placed by the railroad when and as directed, and there turned over to the Army for further disposition. (R. 275) It cannot be contended that there is any duty on a railroad, by tariff, custom or law, after delivery has been accomplished, subsequently to return to the pier to unload the freight.

The Army Base covers a large enclosure extending inland from the piers, a distance of more than two miles, to a connection with Virginian Railway tracks. (R. 273) Delivery of freight by the railroads was made to yard tracks situated near the inland entrance to the Base. Cars consigned to the Army Base were delivered only when ordered by the Army and were placed as directed on designated storage tracks. This involved splitting up the trains at the entrance to the Base and placing the cars on certain tracks as directed by the Army. (R. 275) After such placement, the cars were taken from the storage tracks and switched to the piers or warehouses without further intervention of

[53] Obviously there are compensating advantages in shipper ownership of piers, or there would not be so many private piers where the free services are not accorded. (R. 309, 511) One advantage is freedom from storage charges. (R. 306)

the railroads, and in no instance was the Belt Line requested to deliver cars directly to the piers. (R. 276)

Upon the foregoing facts, the Commission found (R. 94, 104) that its "pronouncement" in *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, 29, (1935), was applicable to this situation:

> "When a carrier is prevented from performing the service by the election of the industry to perform it, and when the service of the carrier would not meet the needs and convenience of or be satisfactory to the industry, the carrier's duty to perform the service under the line-haul rate is discharged, and there is no obligation resting upon it to make an allowance to the industry for performing the service."

The foregoing statement is pertinent to a situation where the railroads have a duty under normal circumstances to render a service, and thus it meets the contentions of the United States on its own ground. The statement would have no relevancy if, as the railroads contend, there is no obligation for which to answer. Thus, the finding means that the railroads' obligation, whatever it might have been, became discharged by final delivery of the cars on the terminal and acceptance by the Army. Thereafter the railroads had no further concern with the freight and could not have been expected to return to the terminal to unload the cars at some subsequent time.

The quoted statement of the Commission was originally made with respect to the spotting of cars on industrial sidings, but the principle involved was the same as here. The question was how much delivery service was included in the line-haul rates, and the Commission found that it varied, depending on circumstances, although the rates remained the same. Just as the United States contends now that full service was not performed, thus creating the right to an allowance, so it was contended in that proceeding that allowances were required, but the Commission held otherwise. Its pronouncement has been upheld by the Supreme

nal facility and when it demanded service from the railroads, its demand was limited to the unloading of cars. (R. 377) For obvious reasons it made no demand that the railroads provide piers to duplicate the facilities from which their agent had been ejected. Yet it would have been just as reasonable for the purpose of satisfying legal formalities to ask for substitute piers as to demand an unloading service which was not desired and which the Army did not intend to permit the railroads to perform. Nevertheless, the formal complaint seeks compensation from the railroads (one cent per hundred pounds on freight handled) for the use of the piers from which their agent was ousted. The argument is simple: Since the railroads paid their agent for the use of the piers as a railroad facility, they should pay the Government for supplying piers for its own freight.

There has never been any obligation on the railroads to provide piers. There is no such obligation under the common law and none in the Interstate Commerce Act, nor have the railroads undertaken the obligation in their tariffs. (R. 309) The tariffs of the Belt Line, which serves the Army Base, specifically disclaimed any such obligation. (R. 310) Piers are essentially station facilities of steamship companies and there is no reason why railroads should be required to provide facilities for vessels to dock.[55] The only

[55] No case will be found stating that a railroad has an obligation to provide piers for interchange of freight with vessels. The cases cited at p. 67 of Appellant's Brief on the point that a carrier has a duty to deliver safely to a connecting line are not authority for the proposition that facilities must be supplied by the initial carrier, other than connecting tracks, as in *N. Y. Central R. Co.* v. *The Talisman*, 288 U. S. 239. The two Commission cases cited on page 67 hold that railroads must provide adequate terminal facilities but it is clear that this does not mean piers, despite a passing reference to piers in the *Galveston* case, 25 I. C. C. 225, 228. In that proceeding, the Commission was dealing with adequate storage facilities, *i. e.*, tracks, warehouses or piers, for the storage of traffic moving on through export bills of lading and not with so-called interchange facilities.

obligation ever placed on the railroads by the Interstate Commerce Act is that contained in Section 6 (11) which requires a rail connection. This provision does not mean that the railroads must provide the pier or the tracks thereon, but only the connection. It is similar to Section 1(9) which requires connections to industrial sidings, but the railroad is not required to furnish the siding. *Cleveland, C.C. & St. L. Ry. v. United States*, 275 U.S. 404, 413.

In the Rivers and Harbors Act of 1919, Congress expressed the view that all ports should have public piers, publicly-owned, and in furtherance of that view, an investigation was instituted before the Commission, known as *Wharfage Charges at Atlantic and Gulf Ports*, 157 I.C.C. 663 (1929). The purpose of the proceeding was to encourage the development of publicly-owned piers by requiring the railroads to make adequate charges on railroad piers, thus eliminating all free services, such as are involved in the instant proceeding. The position taken by the Secretary of War was quite different from that of the Army in this case and the report of the Commission indicated that the railroads had neither the obligation to provide piers nor to absorb charges on the non-railroad piers. In the instant proceeding the Commission came to the same conclusion and, in addition, using the Government's own testimony, found that the railroads had not failed to provide reasonable pier facilities. (R. 93, 105)

Since the railroad facilities were more than adequate to take care of normal traffic, it seems logical and in line with constitutional principles to conclude that special facilities for war are for the Nation to provide. When the Nation requisitioned existing railroad facilities, it was hardly in a position to suggest that the railroads had failed in their duty to provide adequate facilities. Carried to its logical conclusion this argument means that the railroads could not have avoided hiring the Army under any circumstances. Had they been able immediately to provide a duplicate facility, the Army could have taken it over and demanded al-

lowances on the ground that remaining facilities were inadequate.

Since the United States now recognizes the right of the railroads to perform the service, and concedes that allowances can be required only when a duty owed has not been performed, it is interesting to speculate what was expected of the railroads with respect to wharfage after the United States seized the piers. On the theory advanced with respect to unloading, the Army should also have requested that duplicate piers be provided as a "prerequisite" to litigation, but no such formalities were indulged to support its demand for a wharfage allowance. The United States is forced to the position not only that a railroad has a primary obligation to furnish piers but also that it must subsidize a shipper who prefers to use his own pier.

In an earlier case dealing with the same facilities at Norfolk, the Commission required the publication of export rates, but not the absorption of wharfage and handling charges. *Norfolk Port Commission* v. *Chesapeake & O. Ry. Co.*, 159 I.C.C. 169 (1929). This conclusion was reached although the carrier provided such services on other piers. In an investigation styled *Interchange of Freight at Boston Piers*, 253 I.C.C. 703 (1942), the Commission again held that railroads are not obliged to pay for or maintain piers not owned by them. In a recent proceeding, decided contemporaneously with the instant litigation, the Commission found that the Government was not entitled to a wharfage allowance for supplying its own piers. The fact that the railroads had paid the terminal operator wharfage charges prior to Army occupation was held not to require allowances to the Army after its control. *Patterson* v. *Aberdeen & R.R. Co.*, 266 I.C.C. 45 (1946). The Government has not sought review of this case, brought by the Secretary of War.

D. The Commission's Conclusion That the Freight Rates Assessed Against Government Traffic Were Not Unreasonable or Discriminatory Is Supported by Substantial Evidence and Is Not Vitiated by Error of Law.

The burden of the Government's argument is, and necessarily must be in order to support an award of damages, that the Army paid unreasonable or discriminatory freight charges. Regardless of the form in which the case is presented, whether directed to the lawfulness of a practice or the right to an allowance, before damages can be awarded, there must be a finding that the Army paid the railroads excessive charges. As the Court said in *Great Northern Ry. v. Sullivan*, 294 U.S. 458, 463, "The shipper's only interest is that the charge shall be reasonable as a whole". Accordingly, the gist and substance of all the contentions of the United States come to the point that the railroads charged the Army for services not performed, that the export rates included four cents for special services, and, therefore, the rates became unreasonable or discriminatory when the service was not rendered.

The Commission found that the charges paid by the Army were not unreasonable; and since this finding is peculiarly subject to the expert judgment of the administrative tribunal, it cannot be set aside unless wholly lacking in evidential support. Although many factors are involved in the determination of reasonable rates, the principal findings of the Commission may be summarized as follows:

(a) The export rates do not of themselves cover unloading and wharfage services and were not made with consideration of such services. (R. 92, 103, 107)

(b) The export rates contain no extra compensation or increment to cover the special services. (R. 92, 105-108)

(c) The export rates to Norfolk are lower than maximum reasonable rates, being depressed to the Baltimore basis for competitive reasons. (R. 92, 105)

(d) The Army was not entitled to export rates but would have been obliged to pay the higher domestic rates except for a special concession of the railroads. (R. 91, 103)

The manner in which the export rates were made precludes the possibility of including four cents or any other specific figures for special services. The Norfolk rates are the Baltimore rates used for competitive reasons and are therefore influenced by conditions at Baltimore rather than Norfolk. The railroads perform unloading service only on their own piers at Baltimore, and despite the fact that the cost of performing the service varies from time to time, the rates are not affected thereby.

The United States offered no evidence to prove that the rates were unreasonable by the standards that the Interstate Commerce Commission ordinarily applies in its administration of the Interstate Commerce Act. Its argument depends entirely on deductive reasoning: The rates included the four cents for special services, and since the services were not rendered, the rates were unreasonable *ipso facto*. This is also the theory of the dissenting opinions whether described as "unjust enrichment" or by some other term, but its fallacy was fully demonstrated of record.[56]

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[56] Before the Commission the Government conceded that the line-haul rates were fixed without taking into account the cost of wharfage and handling services. (R. 530) Although this is not the usual method of rate-making, the situation presented in this case is by no means unique. In a case decided so recently (October 4, 1948) that it has not appeared in printed form, the Commission approved the publication of charges for unloading fruits and vegetables, a service that had hitherto been performed at certain stations without charge. Despite the long existence of free service, the Commission found that compensation for the unloading had not been included in the line-haul rates and that "the establishment of specific charges for unloading, at New York and Philadelphia, without reference to the levels of the line-haul rates is justified". *Unloading Charges, Fruits and Vegetables, New York and Philadelphia*, I. & S. Docket No. 5500.

The evidence upon which the Commission relied and which was uncontraverted by the United States is as follows: The history of the export rates shows that they contain no factor or increment to compensate for unloading or wharfage. (R. 284-285) The line-haul carriers, which make the rates, have no participation in the port services which are accorded or not, as the case may be, solely by the local lines at the port. (R. 284) In many instances export rates to the various ports are the same as the domestic rates which obviously include no such services. (R. 286) This is especially true at Baltimore and the export rates at that port provide the basis for Norfolk. Certain types of freight which the railroads do not unload take the same export rates. (R. 286) The export rates apply to freight moving over private piers, if direct delivery is made to vessel without shipper interference, although railroads do not perform the special services. (R. 455). These and other reasons support the findings of the Commission to the effect that the export rates contain no extra compensation for special services.

The evidence showing the depressed nature of the Norfolk export rates, *i.e.*, that they are lower than maximum reasonableness, will not be recited in this brief. (R. 285-287) The Court will appreciate that this is a subject with which the Commission has complete acquaintance as no problem has more consistently occupied its attention during the entire period since 1887 than the so-called port differential adjustment. It will suffice to say that of all the North Atlantic ports Norfolk has the lowest export rates on the basis of distance, comparison with prescribed domestic rates, and other relevant factors. As stated by the Commission, any further reduction by means of allowances would make the export rates that much more below reasonable limits. (R. 108)

The United States attacks this finding of the Commission on the ground that the export rates to Norfolk were at the maximum reasonable level because if the rates had been any

higher, no competitive traffic would have gone to Norfolk but would have moved to Baltimore or other competitive ports (Brief for the United States, p. 37). The United States did not address this argument to the Commission, presumably because counsel for the United States must be aware that the argument is inconsistent with the principles of rate regulation that the Commission has applied throughout its history. When customary standards of rate making, such as cost and distance, are disregarded and a rate is reduced to meet competition, it cannot be said to be at the maximum reasonable rate level; nor is a rate above a maximum reasonable level merely because it is higher than the rate charged to some competitive point. The fact is that export rates to most ports, which are competitive with Norfolk, are higher than the rates to Norfolk. The domestic rates to Norfolk are higher than the domestic rates to certain other ports which compete with Norfolk. Stated briefly, the argument of the United States is that the level of the export rates to Baltimore is the test for determining whether the export rates to Norfolk are at the maximum reasonable level. If this were true, the export rates to every other North Atlantic port would be proved unreasonable since, with the exception of Norfolk, every other port takes higher rates than Baltimore. This occurs under the port differential arrangement which has been approved many times by the Commission. The lower export rates to Norfolk have not been prescribed by the Commission, but result solely from the action of certain railroads, which serve no other port, in holding down the rate level at Norfolk to the lowest basis at any competitive port. *City of Philadelphia* v. *Baltimore & O. R. Co.*, 231 I. C. C. 21, 25-26 (1938).

With respect to the allegation of undue discrimination under Section 2, the Commission held that, "If anything, the complainant is being favored" (R. 93) and that the freight of other shippers "is not the like kind of traffic contemplated by Section 2 of the Act dealing with discrimina-

tion, and if handled in the same manner as the complainant's freight, the export rates would not apply, much less the accessorial service demanded by the complainant or an allowance therefor". (R. 105)

Little argument on this point is necessary since, as has already been shown, the railroads do not unload export freight for shippers who control their own piers and in no event pay allowances in lieu of this service. (R. 305, 316, 323, 342, 347, 351, 357) The tariffs defining the practices at the various ports contain no provision for allowances. (R. 460-484) While it is true that the Belt Line tariff referred to the payment to terminal operators at Norfolk as "an allowance", it is clear that the payment was to be made only to the agency named and that it was not an allowance in the usual sense.[57] (R. 429)

The Commission's findings on this issue are conclusive. With respect to the application of Section 2, the Supreme Court stated in *United States* v. *Wabash R. Co.*, 321 U. S. 403, 411, 413, as follows:

> "Differences in conditions may justify differences in carrier rates or service. In determining whether there is a prohibited unjust discrimination or undue preference, it is for the Commission to say whether such differences in conditions exist and whether, in view of them, the discrimination or preference is unlawful. * * * In any case findings of discrimination or undue prefer-

[57] It will be noted that the tariff quoted in the Brief for the United States, p. 72, could not be applied without reference to the tariffs of the Belt Line Railroad, whose charges were to be absorbed. Upon reference to that tariff the method to be followed in making payments was clearly indicated, *i.e.*, "to the Lincoln Tidewater Terminals, Incorporated, and/or Transport Trading and Terminal Corporation". (R. 429) It is clear under this provision to whom the payment was to be made, *i.e.*, only the terminal operator named, "as Agent", and not to the Army or any other shipper. Thus the argument that the tariffs apply to any type of traffic on a particular pier, and not to payments to a designated agent, is clearly unsound.

ence under §§ 2 and 3 (1), as we have said, are for the Commission and not the courts."

In *Barringer & Co.* v. *United States*, 319 U. S. 1, 6, which dealt with the loading of cars under certain conditions and the refusal of the railroads to load under other conditions, the Court said that the weighing of "circumstances and conditions," as required by Section 2, "is a question of fact for the Commission's determination." The opinion of the Court also makes clear that the question of discrimination is not to be isolated from other issues and decided without reference to concessions granted by the railroads which affect the total charges paid. Thus, the Commission's findings relative to the low level of the export rates and their special application to the Government have a bearing on the disposition of the issue of discrimination.

Again, it may be pointed out that the Commission's conclusions were in line with its past decisions in other similar cases and thus were not made inadvertently or with an inadequate understanding of the port rates and practices. The *Norfolk Port Commission* case, 159 I. C. C. 169 (1929), in which a carrier was required to maintain the same port rates as other railroads but not the port services, shows that the rates are not intrinsically wrong when the service is not granted, and that the line-haul rates do not necessarily include the wharfage and unloading, or what the appellant now calls the means of interchange with vessels. In the *City of Newark* case, 182 I. C. C. 51 (1932), the Commission found a violation of Section 3 in the failure to perform unloading services on railroad piers, but the prejudice was removed by "eliminating the free service" on other piers, as suggested by Commissioner Mahaffie. (See *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.*, 229 I. C. C. 463, 469 (1938)). The Commission declined to find a violation of Section 2, or that the service should be granted on private piers, both of which findings necessarily imply that the port rates do not of themselves include the services. The *Newark, N. J., Cham. of Com.* case, 206 I. C. C. 555 (1935) stands for the proposition that Section 2 does

not require the port services, but that the essential issue arises under Section 3 of the Act, and thus that there is no obligation to unload water-borne freight apart from preferential treatment accorded competitive shippers. In the *Weyerhaeuser* case, where the complaining terminal operator was found to be a public wharfinger, and thus qualified to claim the benefit of Section 3, under the established practices of the railroads, no case was found under Sections 1 and 2 for the same reasons mentioned above.

CONCLUSION.

For the reasons that have been stated in this brief the judgment of the district court should be affirmed.

Respectfully submitted,

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APPENDIX.

I. The relevant provisions of the Judicial Code, as amended by the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208, 28 U. S. C. 41 (28), 43-48) are as follows:[1]

§41. (Judicial Code, section 24.) Original jurisdiction.

The district courts shall have original jurisdiction as follows:

* * * * * * * *

(28) Setting aside order of Interstate Commerce Commission.

Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

§43. Venue of suits relating to orders of Interstate Commerce Commission.

The venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.

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[1] The provisions of the Urgent Deficiencies Act have been incorporated into Title 28 of the United States Code by Public Law 773, 80th Congress, approved June 25, 1948 (see 28 U. S. C. §§ 1253, 1336, 2101, 2284, 2321-2325).

§44. Procedure in certain cases under interstate commerce laws; service of processes of court.

The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in sections 45, 45a, 47a, and 48 of this title and (b) in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 47, 47a, and 48 of this title. The orders, writs, and processes of the district courts may in the cases specified in this section and in the cases and proceedings under sections 20, 43, and 49 of Title 49, run, be served, and be returnable anywhere in the United States.

§45. (Judicial Code, section 209.) District courts; practice and procedure in certain cases.

The jurisdiction of the district courts of the cases specified in section 44 of this title, and of the cases and proceedings under sections 20, 43, and 49 of Title 49, shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the district court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action

or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence in cases pending in said court.

§45a. (Judicial Code, sections 212, 213.) Special attorneys; participation by Interstate Commerce Commission; intervention.

The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this title and in the cases and proceedings under sections 20, 43, and 49 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: *Provided fur-*

ther, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General therein.

Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States.

§46. (Judicial Code, section 208.) Suits to enjoin orders of Interstate Commerce Commission to be against United States.

Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commission; but the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit.

§47. Injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court; time for taking.

No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States,

or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission to the Attorney General of the United States, and to such other persons as may be defendants in the suit: *Provided*, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set

aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.

§47a. (Judicial Code, section 210.) Appeal to Supreme Court from final decree; time for taking; priority.

A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that Court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court.

§48. (Judicial Code, section 211.) Suits to be against United States; intervention by United States.

All cases and proceedings specified in section 44 of this title shall be brought by or against the United States, and the United States may intervene in any case or proceeding whenever, though it has not been made a party, public interests are involved.

II. The relevant provisions of Part I of the Interstate Commerce Act, as amended, are Sections 1(5)(a), 1(6), 2,

6(8), 8, 9, 13(1), 15(13), 16(1), and 17(9). These sections are found in Title 49 of the United States Code:

§1: Regulation in general; car service; alteration of line.

(5) Just and reasonable charges required; classification of messages, and rates; exchange of services.

(a) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

(6) Classification of property for transportation; regulations and practices.

It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

§2. Special rates and rebates prohibited.

If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

§6. Schedules and statements of rates, etc., joint rail and water transportation.

(8) Preference to shipments for United States. In time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given over all other traffic, for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. And in time of peace shipments consigned to agents of the United States for its use shall be delivered by the carriers as promptly as possible and without regard to any embargo that may have been declared, and no such embargo shall apply to shipments so consigned.

§8. Liability in damages to persons injured by violation of law.

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a rea-

sonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

§9. Remedies of persons damaged; election; witnesses.

Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

§13. Complaints to and investigations by Commission.

(1) Complaint to Commission of violation of law by carrier; reparation; investigation.

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said commission by petition, which

shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

(13). Allowance for service of facilities furnished by shipper.

If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this chapter and shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

§16. Orders of Commission and enforcement thereof; forfeitures.

(1) Orders by Commission for payment of damages.

If, after hearing on a complaint made as provided in section 13 of this title, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

§17. Commission procedure; delegation of duties; rehearings.

(9) Judicial relief from decisions, etc., upon denial or other disposition of application for rehearing, etc.

When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.